TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 265

CLARENCE W. BLAIR, PETITIONER,

vs.

BALTIMORE & OHIO RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED JULY 18, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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RECORD

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY

No. 2677 July Term, 1941A

Clarence W. Blair
vs.
Baltimore & Ohio Railroad Company, a corporation

I.

RELEVANT DOCKET ENTRIES

June 18, 1941, Summons in Trespass to the first Monday of July, 1941. Statement and Affidavit filed.

July 9, 1941, Writ returned served June 20, 1941 on defendant corporation by serving R. A. Morrison, Assistant Superintendent, together with copy of Statement of Claim.

August 5, 1941, Praecipe for issue filed (11).

November 30, 1942, Jury Sworn.

December 2, 1942, Defendant's point filed.

Eo die, Verdict for the plaintiff in the sum of Twelve Thousand ($12,000.00) Dollars.

December 3, 1942, Motion ex parte Defendant for Judgment N. O. V. filed.

Eo die, Motion ex parte Defendant for New Trial filed.

December 12, 1942, Testimony Lodged.

December 27, 1942, Testimony filed.

July 22, 1943, After argument, motion for judgment non obstante veredicto is refused.

Eo die, exception noted to defendant and bill of exception sealed.

Eo die, motion for a new trial is granted, and it is further ordered and directed that the above stated case be listed for trial as soon as convenient after the resumption of jury trials in September, 1943.

Eo die, exception noted to plaintiff and bill of exceptions sealed.

Eo die, Opinion filed.

August 25, 1943, Certiorari in appeal ex parte Baltimore & Ohio Railroad Co., a corporation, to the Supreme Court filed.

October 11th, 1943, Certiorari in Appeal ex parte Plaintiff to the Supreme Court filed.

October 22, 1943, Notice of Appeal filed showing service accepted Oct. 21, 1943 by Attys. for Defendant.

January 3, 1944, Certificate of Trial Judge filed.

II.

STATEMENT OF CLAIM

1. Plaintiff avers that the Baltimore & Ohio Railroad Company is a corporation duly organized and existing, and is a common carrier by steam railroad and engages in both interstate and intrastate commerce, and that its lines of railroad run into and through the States of Ohio, Pennsylvania, West Virginia, New York and other States, and that a portion of its said line of railroad runs from New Castle Junction, Pennsylvania, through the Borough of Ellwood City to Pittsburgh, Pennsylvania.

2. Plaintiff, Clarence W. Blair, avers that he resides near Ellwood City, Pennsylvania, and that for a long number of years he had been employed by the defendant company in the capacity of trucker at the freight station and warehouse in Ellwood City, Pennsylvania, and that his duties consisted in loading and unloading, receiving and delivering cars containing both interstate and intrastate shipments, and delivering the contents of said cars to the warehouse, and he also loaded outbound freight from the warehouse and trucks into cars for transportation in both interstate and intrastate commerce.

3. Plaintiff avers that on or about June 26, 1939, while in the course of his regular employment he was directed by the defendant's station agent, L. R. Kimes and chief clerk P. B. Forsythe, who were his immediate superiors and from whom he was required to take orders, to unload a certain box-car

which had come in to the freight station some short time before, and that the said car contained shipments which originated at points beyond the territorial limits of the State of Pennsylvania for shipment to Ellwood City, Pennsylvania, where the said freight station was located; and that in compliance with said order he proceeded to unload said car, and that he unloaded the merchandise except three lengths of seamless steel tubing, which shipment originated at Lorain, Ohio, and was consigned to National Tube Company, Ellwood City, Pennsylvania; that the three lengths of pipe weighed in excess of 3100 pounds, and were upwards of ten inches in diameter and thirty feet in length, and that the plaintiff was physically unable to handle and unload the said pipe alone, and that he was the only man assigned to unloading cars and was the only employee that worked in the warehouse; and he thereupon went to said agent and chief clerk and told them he was unable to unload the said tubing and requested that it be sent in the car to the said National Tube Company's mill, as was customary and usual in such situation, where an adequate force of men and suitable and adequate unloading appliances were available, but that the said agent and chief clerk peremptorily ordered him that the said tubing must be unloaded at the warehouse or freight house, and that he should be able to unload it with the assistance of Domenic Fanto, section foreman, and J. C. Miller, the car inspector, both employed by the defendant company, and instructed the plaintiff to call upon those men to assist him, which he accordingly did; and with their assistance, and relying upon the superior judgment of his superiors, undertook to unload the said lengths of tubing with

the facilities available, consisting of a two-wheeled hand nose-truck; and that he, with the assistance of the two men assigned to work with him, were engaged in the movement of one of said lengths of tubing from the said box-car to the said warehouse or freight station, and had removed it from the car, across the station platform to the warehouse, and that the said length was lying lengthwise from the front to the handles of said truck and beyond, and that the plaintiff had hold of the right-hand handle of said truck and one of the other men had hold of the left-hand handle, and the third man had hold of the pipe or tubing at the place where it lay across the nose of said truck, and that the plaintiff and the other employee who had hold of the handle of said truck were keeping the handles as low to the floor as possible for the purpose of allowing the pipe to lie in as near a horizontal position as possible, and the third man was holding the pipe at the nose of the truck; that the pipe extended forward beyond the nose of the truck some twelve or thirteen feet, the truck being from nose to the end of the handles some four feet, and the pipe extended beyond the handles an equal distance of twelve to thirteen feet; and plaintiff avers that the floor of the warehouse had sunk and that defendant had from time to time over a period of five years last past prior to said injury, patched the floor at divers times and places, and had placed a piece of timber or car flooring some three inches in thickness just inside the warehouse door where the floor had sunk from the level of the platform, it having been previously on the level with the platform, and that piece of wood was beveled at the far side away from the door so as to slant down to the floor, and said piece of wood or timber

was some five inches wide. The plaintiff avers that in taking the said length of pipe in said door on said truck, the length of tubing started to slip forward on said truck, due to the rough surface of the floor and the failure of the employee at the nose of the truck to hold it securely in position, and that thereupon said employee let go his hold and jumped away from the truck, as did the employee on the left-hand handle of the truck, leaving the plaintiff holding the right-hand handle of the truck; and the front end of the pipe slid forwards, striking the floor of the warehouse, causing the truck and the wheels thereof to kick backwards with terrific force and violence, and the right-hand leg of the truck, which is some distance below the right-hand handle, struck the plaintiff in the left front side of the body in the abdominal region.

4. As the direct and sole result of the aforesaid, the effects of the said accident resulted in the following injuries, treatment, hospital care and attention: severing and injuring the costal cartilage, and injuring and damaging the muscles, nerves, ligaments, tendons, bones and blood-vessels of that portion of the body; that he thereafter underwent an operation in Mercy Hospital, Pittsburgh, Pennsylvania, and since the time of the injury has been in ill health and has suffered excrutiating pain and mental anguish and inconvenience, and has been unable to follow his vocation or any vocation for long periods of time and has lost earnings, and his earning power has been impaired for all time to come, and he has been compelled to be under the doctor's care and receive medical and surgical attention and treatment, including some five weeks as a patient in

the Ellwood City Hospital, and one month in the Mercy Hospital in Pittsburgh from Thanksgiving Day 1939 until December 28, 1939; and that thereafter he was confined to the home for nine weeks and the doctor attended him there daily and sometimes twice a day; and that the plaintiff due to his weakened condition, contracted bronchitis and a throat and lung affliction which has shortened his breath and made breathing difficult and causes the patient to cough and causes great discomfort.

5. Plaintiff avers that at the time he reported to the defendant's said agent and chief clerk that he was unable to move the said tubing from the car to the freight-house, he was informed by said agent and chief clerk that with the assistance of the two men assigned to do that work, that it could be done with facility; and summarily directed him to do so; and that the plaintiff herein relied upon their superior judgment in the matter.

6. Plaintiff avers that the defendant failed in its duty to provide him suitable tools and appliances with which to perform his work, or to provide him a reasonably safe place to work, and failed to supply sufficient and competent help with which to do the work. Plaintiff avers that there are suitable, safe and adequate appliances in common use by railroads and manufacturing concerns, with which to safely and easily move heavy loads; and that on prior occasions he had requested a crane and unloading devices, and that defendant through its agents and employees, his superiors, promised to supply adequate unloading equipment for heavy loads; and relying on those promises he continued to work, and although ample time had elapsed within which to

supply such devices, the defendant failed and neglected to supply same.

7. Plaintiff avers that he was the only man regularly employed in the freight house, and avers that the men assigned to assist him were unused and inexperienced in the movement and transportation of heavy objects or in unloading heavy objects from cars; and that the force assigned to remove the said tubes was inadequate in man power to do said work; and defendant knew or should have known of the inadequacy of a crew of three to move these said lengths of tubing, and were negligent in requiring the three men to do this work.

8. Plaintiff avers that the two men assigned to assist in the moving of the said lengths of tubing, in addition to being unskilled in said work, were not sufficiently strong to perform the work assigned them, and that further they were negligent in allowing the said load to shift and in failing to hold the pipe or tubing securely on the nose of the truck, and in failing to hold onto the handle of said truck.

9. Defendant was negligent in failing to provide a reasonably safe place to work in that it suffered and allowed the floor of the said freight house to sink lower than the level of the unloading platform, and allowing the floor to become uneven and patched and bulged and out of repair in that patches had been improvised that made the floor rough, so as to retard, hinder and impair the safe movement of heavy loads on trucks across said floor.

10. Plaintiff avers that at the time of his said injury he was engaged with the defendant in interstate commerce.

11. Plaintiff avers that a substantial portion of his duties was engagement with the defendant in interstate commerce, and that therefore he was engaged with the defendant in interstate commerce at the time of his said injury.

Wherefore plaintiff claims damages against the defendant in the sum of $100,000.00, to recover which this action is brought.

(s) J. THOMAS HOFFMAN,

Attorneys for Plaintiff.

State of Pennsylvania,
County of Allegheny ss:

Before me, the undersigned authority, personally appeared Clarence W. Blair, who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing Statement of Claim which are within his knowledge are true, and all other facts alleged are true as he is informed and believes and expects to be able to prove at the trial of this cause.

(s) CLARENCE W. BLAIR

Sworn to and subscribed before me this 13th day of June, 1941.

(s) D. A. Hunter,
Notary Public.

My commission expires April 20, 1943.
(Seal)

III.

THE EVIDENCE

Pittsburgh, Pa., Monday
November 30, 1942

Coram: Hon. James L. O'Toole, Jr., J. and a Jury

Counsel Present

For the Plaintiff: J. Thomas Hoffman, Esq.
For the Defendant: V. M. Casey, Esq.

PLAINTIFF'S CASE

Mr. Hoffman opens to the jury on behalf of the plaintiff.

Mr. Hoffman:

If your Honor please, plaintiff wishes to introduce into evidence the undisputed portions of the Statement of Claim, no Affidavit of Defense having been filed, that the Baltimore & Ohio is a corporation and that it owned and controlled the instrumentality involved in this case, and that Mr. Blair was in their employ.

Mr. Casey:

No objection.

Mr. Hoffman:

I presume you will also admit Mr. Casey, that the Baltimore & Ohio Railroad Company is a

common carrier and engaged in both intra and interstate commerce?

The Court:

Do you admit the nature of the shipment?

Mr. Casey:

We will stipulate that the shipment involved was in interstate commerce, from Lorain, Ohio, to Ellwood City, Pa.

CLARENCE W. BLAIR, the plaintiff, being duly sworn, testified as follows:

Mr. Hoffman:

If the Court please, I neglected to introduce Mr. Randall Luke, a member of the Bar of Lawrence County.

The Court:

We are glad to welcome Mr. Luke.

Direct Examination

Mr. Hoffman:

Q. Your name is—

A. Clarence W. Blair.

Q. And where do you live, Mr. Blair?

A. Ellwood City.

Q. In Lawrence County, Pa.?

A. Yes, sir.

Q. And I believe you just live out of town?

A. Yes, in a little suburb they call Wertenburg.

Q. How far is that out?

A. It is about two miles.

Q. With whom do you live there?

A. My wife.

Q. And how old are you?

A. I am forty-five now.

Q. When were you forty-five?

A. June 20th.

Q. This year, '42?

A. Yes, sir.

Q. And where were you employed on June 26, 1939?

A. By the Baltimore & Ohio Railroad in Ellwood City.

Q. How long had you been employed by them at that time?

A. I started in December, 1936.

Q. And in what capacity were you working for them during that time?

A. As a trucker.

Q. Where?

A. In the warehouse.

Q. Warehouse, Ellwood City Warehouse?

A. Yes, sir.

Q. Freight house?

A. Yes, sir.

Q. Had you ever worked at that job before?

A. Yes, sir.

Q. For the B. & O.?

A. Yes, sir.

Q. How long had you worked at it before?

A. Well, either two or three different periods, not too long at a time; I was substitute for ones that was off, off of employment.

Q. I believe your father had been a trucker there before you?

A. Yes, sir.

Q. Now, on this day, June 26, 1939, do you recall which day of the week that was?

A. It was on a Monday.

Q. What were you doing that day?

A. Well, as usual, unloading inbound freight.

Q. And where was the car that you were unloading?

A. It was spotted at the platform next to the warehouse.

Q. What time did that car arrive there?

A. Well, it arrived some time between Saturday when I left and Monday morning, I don't know the time it was spotted there.

Q. And how much merchandise did you unload from that car?

A. Well, I don't know the exact amount; there was quite a bit of other merchandise in the car.

Q. What was in the bottom of the car?

A. There was three lengths of steel tubing.

Q. How long were those lengths of tubing?

A. Well, I would say they were around 30 feet; I don't know for sure; they was around 30 feet.

Q. Did you have the bill of lading for those lengths of pipe?

A. Yes, sir.

Q. And they were consigned to whom?

A. The National Tube Company at Ellwood City.

Q. And were shipped from where?

A. From Lorain, Ohio, the National Tube at Lorain, Ohio, shipped them.

Q. Did the bill of lading show the weight of those pipes?

A. Yes, sir.

Q. What was the weight?

A. 3100 pounds.

Q. For the three of them?

A. For the three of them.

Q. About the same length?

A. Yes.

Q. Same size?

A. Same size.

Q. How big around were they?

A. I would say they were around ten inches in diameter, around there somewhere.

Q. And made of what?

A. Seamless steel tube.

Q. How thick were the walls of those pipes?

A. Well, they would be around, possibly, a quarter of an inch.

Q. And where were they laying in the car?

A. Right on the bottom of the car.

Q. And nearest which door?

A. They were nearest the door to the warehouse, the same side that I unload the car on.

Q. Did you have anything from the car to the station platform?

A. A steel plate.

Q. A steel plate?

A. Yes, sir.

Q. The floor of the car and the station platform, how were they as to height?

A. Well, they were almost the same.

Q. Almost level, were they?

A. Yes, sir.

Q. So you had a steel plate, you mean, across there?

A. Across from the platform to the floor of the car.

Q. When you came across these three lengths of pipe what, if anything, did you do?

A. Well, when I had the car unloaded, all but the three lengths of pipe, I went in and told the agent that the pipe was too large for me to handle and suggested for him to send it to the tube mill, which we had been accustomed to doing in other occasions. He told me to get Mr. Miller, the car inspector, and Dominick Fanno, the section hand, to help me unload them. I told him I didn't think we could unload them. Then he informed me if I didn't do the work he would get somebody else that would. I got these two men and undertook to unload the pipe. We unloaded one of them and in unloading the second one, an uneven place in the floor caused this pipe to slip on the nose truck. Mr. Fanno and Miller left go of the pipe and jumped. I tried to keep it from slipping from the nose truck and the nose truck kicked me in the side and caused the injury.

Noon recess

Afternoon Session

CLARENCE W. BLAIR, the plaintiff, recalled, resumed his testimony as follows:

Direct Examination (continued)

Mr. Hoffman:

Q. Who was Mr. Kimes?

A. The agent.

Q. And who was your foreman there?

A. Mr. Kimes and Mr. Forsythe.

Q. Who is Mr. Forsythe?

A. He is the chief clerk.

Q. Were you required to take orders from both of them?

A. Yes.

Q. And what did you do then after Mr. Kimes had told you to get those men and unload that pipe?

A. Well, I told him I didn't think we would be able to do that, the three of us, and he told me that if I couldn't do it they would get somebody there that could.

Q. Then what did you do?

A. Well, I undertook, with the help, to unload them.

Q. Did you get the two men that he told you?

A. Yes, sir.

Q. That is, Mr. Miller, you say, and Mr.—

A. And Mr. Fanno.

Q. And what was Mr. Miller's job there?

A. Car inspector.

Q. And Mr. Fanno's job?

A. Section foreman.

Q. And were those two men big men or—

A. No, they are both pretty old men. I do not know just the age but around sixty-five, I guess, seventy years old, maybe, Mr. Miller might be somewhere around that.

Q. How old is Mr. Fanno?

A. Well, I would say he is in his sixties.

Q. What did you do then?

A. Well, we started to unload the three pieces of pipe.

Q. How did you go about that?

A. Well, we had nothing to unload them with, only just the nose truck and we would get them up high enough—

The Court:

Q. Will you describe the nose truck; you used that expression several times.

A. Yes, sir. It is a two-wheeled truck with steel —a piece of steel extending up on top of it about eight inches, I would say, balanced on two wheels; it has two handles that comes back on it and it balances on two wheels with a load on it.

Q. The handles are on the opposite end from the two wheels?

A. Yes, sir.

Mr. Hoffman:

Q. I show you here plaintiff's Exhibit No. 1, and ask you what that is, or if you know?

A. That's two nose trucks and one one-wheeled dolly, one roller dolly it is called.

Q. Were those the ones at the Ellwood station?

A. Yes, sir.

Q. Those are the ones that were there when you were there?

A. Yes, sir.

Q. Which of those were you using?

A. Well, in this picture it would be the one that is nearest to the building.

Q. That building, is that the freight house?

A. Yes, sir, that's the freight house.

Q. Now, was that the larger or the smaller of the two trucks?

A. Well, I would say they are both practically the same, they are made on the same principles.

Q. What did you do with them?

A. Well, we got the tube up on the nose truck and one of the men was holding on one side of the handle with me and the other was on the front end.

Q. Who was on the front end?

A. Mr. Fanno.

Q. And how did you get the pipe out of the car?

A. Well, we had to zig-zag it to get it cornerways of the car in order for it to clear the door.

Q. The door was in the middle of the car?

A. Yes, sir. Because the pipe was too long to come straight out. It covered the door when it was laying down in it.

Q. Did you get the first one out?

A. Yes, sir.

Q. What did you do with the first one?

A. Just as we got the first one the tube mill truck backed into the warehouse door and we loaded it on the tube mill truck.

Q. Where was that door with relation to the door of the freight house, where you took the tube out of the car door?

A. Well, it is not directly in line across.

Q. It is on the other side?

A. The door they load out of is down a little ways from the door that you unload out of the car.

Q. That is on the opposite side of the—

A. Opposite side of the warehouse.

Q. You drive in one side of the warehouse and load the trucks and the cars are on the other side, is that right?

A. Yes, sir.

Q. I see. What did you do with the first pipe you got out?

A. We loaded it on the truck, National Tube Mill's truck.

Q. Then what did you do?

A. Well, we went back to get the other one and

we got another one loaded on to the nose truck and started out with it, after we had zig-zagged it in order to bring it out the door. As we went through the door the uneven part—

Q. Which door are you talking about?

A. The one coming into the warehouse from the car. It caused this pipe to slip—start slipping on the nose truck and the two men assigned to help me, they both let go of it and jumped and I tried to hold on to the truck in order to keep the truck from kicking me, if it would kick it would have broke my leg, which it kicked off to the side and the foot of the truck kicked me in the side.

Q. What part of the truck hit you in the side?

A. The foot at the leg on the nose truck.

Q. Which side?

A. What would be on the, I think, right side as you would be pushing the truck.

Q. Where did it hit you, Mr. Blair?

A. Right in this region right here (indicating).

Mr. Casey:

Q. Indicating—

A. Right below the ribs, sir, right at the edge of these ribs here.

Mr. Hoffman:

Q. On the left hand side of your body just below the ribs?

A. Yes, sir.

Q. What caused the pipe to slip?

A. Well, the not adequate equipment, for the first thing, on account of it, just nothing but the nose truck; then the two men assigned to help me leaving go of it.

Q. What was there at the door of the warehouse on the floor?

A. Well, at the time there had been a plank, or a thick board had been nailed on there and then beveled so it would let you come up out of the warehouse on to the platform.

Q. Was the floor of the warehouse lower than the floor of the platform?

A. It had sunk, yes, sir.

Q. It had sunk?

A. Yes.

Q. It was formerly level, was it?

A. At one time it was, yes, sir.

Q. How wide was the plank nailed on the floor inside the warehouse?

A. I would say around six or eight inches, maybe.

Q. And beveled to the floor, you say?

A. Beveled to the floor going in.

Q. Now, what other equipment did you have there at the warehouse to unload freight?

A. Well, the other nose truck and that dolly.

Q. And is the dolly shown here in this photograph?

A. Yes, there is the dolly shown there in the picture.

Q. Could you have handled the pipe equally well on the dolly?

A. Oh, no.

Q. Why not?

A. That is a one-wheeled dolly and you couldn't balance it on there because it is only just about, maybe, eight inches off the floor and it has just got one wheel.

Q. The one wheel?

A. One wheel.

Q. It has a big round roller, is that right?

A. Yes, sir.

Q. Would it be necessary to lay the pipe on that roller in moving it in?

A. There is a small frame on there built on to the roller but it is just flat, you couldn't hold the pipe on that.

Q. And as you were going in that warehouse down there, how low, or at what elevation did you have the handles of the truck?

A. Well, you would carry the handles of the truck in order so that the pipe would lay level, or right straight on the nose truck.

Q. Keep an even keel on it, is that right?

A. Keep it from tipping; it was just on a balance, see?

Q. I see. The nose of that truck, of what material was that?

A. Steel.

Q. And when you had the pipe on that truck where did the pipe lay with relation to that nose of the truck?

A. It laid right up on the steel nose of the truck and extended back.

Q. How long, about, was this truck?

A. Around five feet.

Q. And how far beyond the handles did the pipe extend?

A. Well, it would extend, I would say, around ten or twelve feet on each end.

Q. That is ten or twelve feet beyond the nose and ten or twelve feet beyond the handles?

A. Yes, sir.

Q. You had it on that truck longwise, lengthwise?

A. Yes, sir.

Q. What did you do when that kicked out, when the truck kicked out?

A. Well, when the two men jumped and left it go, I tried to hold on to it to keep from being hurt, but it was too much for me, I couldn't handle it.

Q. With what force did it hit you?

A. Well, they kick with a violent force, when it starts back there with the weight on it, such as the tube was.

Q. Was there anything on the tube?

A. Yes, it was greased.

Q. Black pipe, was it?

A. Yes, sir.

Q. Did the grease on the pipe tend to make it more slippery or not?

Mr. Casey:

Objected to as leading.

Mr. Hoffman:

All right, strike that. It is a little leading, I am sorry.

Mr. Hoffman:

Q. Did the grease on the pipe affect the situation any?

Mr. Casey:

Objected to as the witness has already testified that it was a depression in the floor that caused the pipe to slip.

Mr. Hoffman:

No, he didn't testify to that.

The Court:

I think he testified someone letting go of the end of the pipe. Of course that question is just as leading as the other one.

Mr. Hoffman:

Q. Now, what did you do right after the accident?

A. Well, right after it had struck me it knocked the wind out of me but I didn't think I was injured to any extent and I kept on working.

Q. Finished that day?

A. Yes, sir.

Q. What time in the morning was that, sir?

A. Well, it was about 10:30, I would say.

Q. How long did you continue to work?

A. I continued to work the balance of the week and until on Monday of the next week.

* * * * * * * * *

Mr. Hoffman:

Q. The other truck, Mr. Blair, is it as good as the one you were using?

A. No, it wasn't, because it had been a rebuilt truck, it wasn't as good and it was higher, stood up higher from the floor.

Q. Besides those two trucks and the dolly, you say that was all the equipment you had there to do the work?

A. Yes, sir.

Q. Had you ever had any conversation with anybody before this accident relative to the tools and appliances to do the work?

Mr. Casey:

Objected to as incompetent, irrelevant and immaterial.

The Court:

I think you have to get it right down to this particular job.

Mr. Hoffman:

I will change the question. I might make it leading if I change it. I was trying to make it as general as I could. I don't want to lead the witness.

Mr. Hoffman:

Q. At any time shortly before this accident, Mr. Blair, did you have any conversation with your foreman in regard to—

The Court:

Moving this pipe.

Mr. Hoffman:

I do not want to make it that close, your Honor.

The Court:

I think you pretty near have to.

Mr. Hoffman:

No. With regard to tools for moving heavy freight.

Mr. Casey:

Objected to as incompetent, irrelevant and immaterial.

Mr. Hoffman:

I think it is quite material, your Honor.

The Court:

I can see where it would be material as to this job.

Mr. Casey:

His question is just as far as heavy freight is concerned.

Mr. Hoffman:

This is that.

The Court:

That is not the way to prove the tools were inadequate, if they were inadequate. It might be something as to assumption of risk by this man as to moving the pipe. It would be only on the pipe job.

Mr. Hoffman:

No, any particular job as to appliances used for general work, were they suitable.

The Court:

I will sustain the objection.

Mr. Hoffman:

May I put an offer on at Side Bar, please?

The Court:

Yes.

Mr. Hoffman (At Side Bar):

Counsel for plaintiff expects to show by the witness on the stand that some time prior to the happening of this accident he had been required to move some tombstones which were heavy and which he complained that he couldn't move and that there had been a discussion of putting in an overhead block and tackle arrangement to unload heavy articles from the cars; that about two weeks before this accident, Mr. Kimes, the plaintiff's superior, told him in the freight house that he was getting a goose neck crane which would facilitate the movement of freight out of the cars and that it would be delivered in about a month, and relying upon that promise the plaintiff continued to work and the accident happened; that but for that promise he

would have quit the employment. I think that is most material.

Mr. Casey (*At Side Bar*):

That is objected to as incompetent, irrelevant and immaterial; for the further reason that the issue here under these pleadings does not pertain to the inadequacy of the tools. A crane might be more suitable for moving some sort of materials, but not others.

Recess.

After recess.

Objection sustained.

Exception noted to plaintiff.

Mr. Hoffman:

Will you step down, Mr. [illegible]

DR. H. R. DECKER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Mr. Hoffman:

Q. What are your initials, Doctor?

A. H. R.

Q. You are a regularly licensed and practicing physician and surgeon in Allegheny County?

A. Yes, sir.

Q. And have been for how long, Doctor?

A. Since 1910.

Q. You are a graduate of which school?

A. Columbia University, Medical Department, New York.

Q. Are you connected with any of the hospitals in the City?

A. At the present time I am on the staff of the Presbyterian Hospital, the Women's Hospital, the Tuberculosis League Hospital, and Veterans' Hospital at Aspinwall.

Q. Do you specialize in any branch of the profession, Doctor?

A. I specialize in surgery and my particular specialty in the surgery realm is thoracic surgery, surgery of the chest.

Q. Did you, at my request, make an examination of the plaintiff, Mr. Blair, here?

A. Yes, sir.

Q. And when was that, Doctor?

A. It was made on the 13th of June, 1941, in my office.

Q. And did you receive a history of the plaintiff having been injured?

A. Yes, sir.

Q. What history did you receive, Doctor?

A. He told me on the 30th of November, 1939, while he was employed by the B. & O. Railroad Company at Ellwood City he was struck heavily in the lower part of the chest or upper abdomen, indicating the lower part of his ribs here, by a truck leg, leg of a truck which overturned and a tube which was on it slipped; the blow was rather severe and knocked the wind out of him at the time but he was able to get up and continue with his work that day; he worked through pretty much of that week; that he had his chest and his abdomen taped by the company doctor, Dr. Helling; then the pain got so bad he had to stop work and he was sent to the

Mercy Hospital for examination by Dr. Sieber and Dr. Sieber took care of him in the next several months. * * *

* * * * * * * *

CLARENCE W. BLAIR, the plaintiff, recalled, testified as follows:

Direct Examination

Mr. Hoffman:

Q. Mr. Blair, had you ever loaded or unloaded material of such size and weight as these pipes before?

A. No, sir, not the nature of the pipes.

Q. And had you ever worked with Mr. Fanno before; had he ever been called to assist you before?

A. Not Mr. Fanno, no, sir.

Q. Where was Mr. Fanno on that truck; where was he?

A. He was holding the pipe up at the nose of the truck, on the front, rather, on the front end, standing to one side holding on to it.

Q. I see. And did that necessitate—could he stand up straight to do that?

A. No, sir, he would have to lean over because it was lower than a man walking.

Q. About how high, Mr. Blair, was the front end of that truck; how high from the bottom of the wheels up to the top of the nose of the truck?

A. Well, I don't know. I never measured one, but I would say around two feet, that is from the wheels to the top.

The Court:

Q. You mean from the floor to the top of the lift?

A. Top of the lift.

Q. From the floor?

A. From the floor to the top of the lift of the truck.

Q. Mr. Hoffman asked you how high from the wheels.

Mr. Hoffman:

I said the bottom of the wheels, the same thing.

Mr. Hoffman:

Q. And Mr. Miller was holding which handle?

A. He was on the—pushing forward he would be on the left hand side of the truck; that would be holding the left hand of the truck on the forward move, moving it forward.

Q. Can you explain a little more in detail how he was holding that?

A. Well, he had hold of the handle of the truck with one hand and helping to balance and holding the tube with the other hand. I was on the other side of the truck doing the same process of holding it on there.

* * * * * * * *

Cross Examination

Mr. Casey:

Q. Mr. Blair, you say you are now past forty-five, is that correct?

A. Yes, sir.

Q. How long had you been working for the Bal-

timore & Ohio Railroad Company prior to 1939?

A. I started in December in 1936, I think that's right. I have my time book when I started and I can tell you for sure.

Q. In what capacity did you start?

A. As a trucker.

Q. That's in the freight house?

A. Yes, sir.

Q. Were you continuously working as a trucker in the freight house?

A. Yes, sir.

Q. During all of your employment up until you got hurt?

A. Yes, sir.

Q. In December, 1936—

A. May I pardon myself? It was December 6, 1935, when I started back the last time.

Q. Started back the last time?

A. Yes, sir.

Q. You had worked for the B. & O. before that?

A. Yes, sir.

Q. How long before that had you worked?

A. Well, I had been employed on two different occasions, I think, at periods of time when other men would be off on account of sickness or something like that.

Q. How long?

A. I would say altogether maybe about nine weeks, maybe.

Q. What was the year you first became an employee of the Railroad—in 1928?

A. 1928, yes, sir.

Q. Did you work off and on then for the Railroad, about in all nine weeks, while someone else

was off, up until December 6, 1935?

A. Yes, sir.

Q. Then you got a regular job at the Ellwood City freight house?

A. Warehouse, yes, sir.

Q. What were your duties there?

A. Trucker.

Q. What are the duties of a trucker?

A. That's unloading and loading inbound and outbound freight, inner state and outer state—that is, it comes from out of state in state, and I loaded it on the same, that is what the bill of ladings called for.

Q. How many other employees were at the freight station on or about June 26, 1939?

A. Just myself in the warehouse.

Q. That is, in the freight house proper, is that right?

A. Yes.

Q. Mr. Kimes, who is he?

A. He was the agent.

Q. At the Ellwood City freight house?

A. Yes, sir.

Q. Mr. Forsythe, who is he?

A. At that time he was chief clerk.

Q. Were they located in the warehouse too?

A. Their office was in the front of the warehouse, partitioned off from the warehouse proper.

Q. Was that a glass partition?

A. No, wooden partition with doors leading in.

Q. While you were there did you ever handle any shipments for the National Tube Company?

A. Yes, sir.

Q. You handled general freight, is that right?

A. Yes, sir.

Q. Freight of all kinds and character that came in there?

A. Yes, sir.

Q. And in handling this freight what would you use?

A. I would use the nose truck.

Q. The nose truck, is that either one of the trucks shown on plaintiff's Exhibit 1?

A. Well, that's—them is both nose trucks.

Q. Why do you call them nose trucks?

A. Well, in the catalog or anything for ordering them, that is the name of them.

Q. Because it has a nose on the front of it, sort of steel binding around it?

A. Yes. There is a steel object stands up there several inches above the arms that extends out.

Q. And above the bed of the truck?

A. Yes, sir.

Q. Ordinarily you push that up under a box or crate and tip it back and that holds it on, is that right?

A. Yes, sir.

Q. To the extreme right as you face plaintiff's Exhibit 1, that wheel-like vehicle there, what is that?

A. That is known as a one roller dolly.

Q. I see up on the one truck a steel bar, what is that?

A. That is a crowbar, what they call a crowbar.

Q. Did you have any rollers around the freight house also?

A. Yes, sir.

Q. And all of this equipment was for the handling of freight, is that right?

A. Yes, sir.

Q. Your crowbar was for when you couldn't lift an object to put the crowbar under it and pinch it up?

A. Pinch it until you started the—

Q. Pinch it until you got your truck under and move it?

A. Yes.

Q. And on June 26th was all this physical equipment present in the freight house?

A. The equipment that is there, yes, sir.

Q. And was it there on the day you got hurt?

A. Yes, sir.

Q. Do you know H. B. Carter, claim agent for the Baltimore & Ohio Railroad?

A. Yes, sir.

Q. Do you know Mr. Fanno?

A. Yes, sir.

Q. And Mr. Miller?

A. Yes, sir.

Q. What time did you start to work on June 26, 1939?

A. Eight o'clock in the morning.

Q. What did you do first?

A. Well, the first thing when I went to the warehouse I fired the furnace, started to poke it up, it was slacked down for the night.

The Court:

Q. Did this happen in June?

A. Yes.

Q. What were you doing firing the furnace?

A. I fired the furnace.

Mr. Casey:

Q. So you fired the furnace when you got there. Then what did you do?

A. You take the seal off the car.

Q. Where do you get that?

A. Off the car. They have a seal book that you take the seals on both side of the car and enter them into the seal book that the Railroad furnishes you, the number of the seal that is on the seal.

Q. You go to where the car is spotted and if the car is to be unloaded you start to unload it, is that right?

A. Yes, sir.

Q. On June 26th did you unload the freight car at the Ellwood City Station?

A. Yes, sir.

Q. Did you take all the freight that was in the car out?

A. All except the three lengths of pipe.

Q. You took the other out first?

A. Yes, sir.

Q. Then there was in the car three lengths of steel seamless tubing, is that right?

A. Yes, sir.

Q. After you got all the other freight out except the tubing, what did you do?

A. I went into the warehouse office and informed the agent that I couldn't handle the three lengths of pipe that were in the car by myself and he told me to get Mr. Fanno and Mr. Miller to help me unload it and I said that I didn't think that we could handle it and he told me that I could either do the work or they would get somebody that could.

Q. You never worked with Mr. Fanno before?

A. He never helped me unload material.

Q. You told the agent at the warehouse that you didn't think the three of you could unload it?

A. No, sir, I told him I didn't think we could.

Q. Where was he at this time when you told him this?

A. In the office of the warehouse.

Q. Was there anybody present at that time?

A. Yes, sir, Mr. Forsythe.

Q. Just the three of you in the office then?

A. Yes, sir.

Q. Before you had gone in the agent's office in the freight house had you tried to lift the tubing?

A. No, sir, I didn't try because it was customary with large stuff that came to the National Tube to leave it in the car and seal the car again and shove it up into their mill where they had proper equipment for unloading heavy material.

Q. Had you ever shipped up steel tubing before?

A. Yes, sir.

Q. Only three pieces of it?

A. Even as low as one piece.

Q. You never unloaded any before in the freight house?

A. I unloaded different kind of tubing, not of this nature, as large or as long as these three pieces were.

Q. With respect to size, what is the closest tubing to this that you unloaded at Ellwood City station during the time you were there?

A. A boiler tube is about five inches, I think, in diameter.

Q. This is about ten, is that right?

A. As near as I can judge. Of course, I didn't measure it.

Q. Boiler tube is how long?

A. I would say different lengths in boiler tubes, maybe 16 feet, maybe 14 feet.

Q. How much would each of those weigh?

A. They are not very heavy.

Q. Are they half as heavy as this?

A. No.

Q. As I understand it, this was the first time that any ten inch seamless steel tubing that you had been required to unload?

A. At the warehouse, yes.

Q. Where had you ever unloaded any other?

A. Didn't unload it, sir, left it in the car.

Q. As soon as you looked at it in the car you decided you couldn't move it yourself?

A. I had the waybills to check the material. The waybill said 3100 pounds for the three pieces, the three of them, and the condition of them I didn't think I could handle them, being over 1000 pounds apiece, was the reason I made the suggestion to leave it in the car.

Q. And ship it up to the National Tube Works?

A. Yes, sir.

Q. When you first went into the office to see the agent you made that suggestion because you thought you couldn't handle it?

A. Yes, sir, I did.

Q. You never handled it before?

A. Not that kind of pipe, no, sir.

Q. Then he said to you to get Fanno and Miller, is that right?

A. Yes, sir.

Q. Where did you get them?

A. Well, Mr. Fanno was down by his shanty with his men and Mr. Miller is around frequently, he is all around there on car inspections. I happened to look up. He was working on a car on what they call the side track. I asked if he would come in and help me and that Mr. Kimes sent me to ask him, which I done the same with Mr. Fanno.

Q. They both came and helped you?

A. Yes, sir.

Q. What did you do first?

A. The first thing we took the nose truck and got it started under the end of the pipe. See, you could roll the pipe on to the edge of the nose truck. Well, that gave you a chance by the weight to pry it down until you could block it and then roll the nose truck under it lengthwise, and then got it balanced on the truck, then zig-zag from one side to the other in order to get it cornerways to come out the door; it was too long to just start it out the door.

Q. You got it on the truck?

A. Yes, sir.

Q. You and Mr. Fanno and Miller got it on the truck?

A. Yes, sir.

Q. Then you started out the car door with it. That is the first tube, is that right?

A. No, we got the first tube out all right.

Q. This is the first tube we are talking about now. You put it on the truck and started out?

A. Yes, sir.

Q. You pushed it out through the car door, across the station platform to the waiting truck on the other side, is that right?

A. Yes, sir, the Tube Mill truck had just backed in when we came out.

Q. What did you do with the tubing?

A. We loaded it right on the Tube Mill truck.

Q. Who is "we"?

A. Mr. Fanno and Mr. Miller and I.

Q. On that first piece of tubing what were your positions with respect to the hand truck?

A. Well, I would say just about the same position.

Q. You and Miller on the back on the handles?

A. Yes, sir.

Q. And Fanno on the front, is that right?

A. Yes, sir.

Q. Were you all stooping down?

A. Have to stoop a little to keep it on an even keel.

Q. Ten feet, you stated, was ahead of the nose of the truck. If you would raise it too much it would go off the front of the truck?

A. If you got it out of balance it would slide either way.

Q. You had to keep the handles of the truck down as you would go along, with one hand on the handle and the other on the tubing?

A. Yes.

Q. Did you have any difficulty pushing it across the station platform?

A. Not any more than pushing anything else; you had to be careful.

Q. That might run off, is that right?

A. Yes, sir, if it gets unbalanced.

Q. It was 1000 pounds with three men and you had it on the truck and had to watch it that it

wouldn't get unbalanced and fall off or wouldn't go too much either way?

A. Yes, sir.

Q. It made it easy to push it if you had the tubing exactly in the center of the hand truck so it would balance on the front wheels?

A. That is the only way you could haul it.

Q. As you pushed it, then there wouldn't be much weight on you then, the truck carried the weight?

A. Yes, sir.

Q. All you had to do was push and steady it?

A. Yes.

Q. You and Miller in the back and Fanno in the front holding it on?

A. Yes, sir.

Q. You pushed it directly out the door and across the platform. and on to the truck?

A. Yes.

Q. Did you see Mains at that time—he was the truck driver, is that right?

A. For the Tube Mill, yes.

Q. Did he help to put it on the truck?

A. No, sir, he went in after waybills.

Q. Then what did you do?

A. We went back for another one of them.

Q. Then you loaded the second tube on the hand truck?

A. Yes, sir.

Q. In about the same way as the first one?

A. Yes, sir.

Q. You on the left hand handle on the rear of the truck, Miller on the right handle, and Fanno on the front?

A. I would say I was on the right hand of the truck.

Q. You were on the right and Miller on the left as you walked with the truck?

A. Yes, sir.

Q. Fanno in the front?

A. Yes, sir.

Q. You started to push it out the door?

A. Yes, sir.

Q. You had a steel plate between the car and station platform to take up that space in there?

A. Yes, sir.

Q. Did you push it down over that on to the station platform?

A. Well, the plate was almost level with the car floor and platform and just push the truck across it. It was spiked to the floor, I spiked it to the floor of the platform and then to the floor of the car so it couldn't move.

Q. You started your truck over that with the second tube on it and over on to the station platform; then what did you do?

A. Started right in the same procedure as with the first one.

Q. How far did you get?

A. We got right inside the door.

Q. That is inside the warehouse door?

A. Yes, sir. And the pipe started to slip and when it did Mr. Fanno and Miller let go of it. I tried to hold on to the truck to keep the truck from kicking back. When it would fall in the front this pipe would hit the floor and that caused the back end to raise up at a high angle; that would kick the truck back with a force, violent force, because there

is 1000 pounds of weight there. I was trying to hold on, to keep the truck from kicking me in the legs; that is what would catch you when you keep back, so I tried to hold on to it. That made the pipe roll and that made the truck kick on the side and the truck leg struck me on the side.

Q. On your left side?

A. Yes. The truck went completely on the floor. When that happened Mr. Mains came out of the warehouse office with the bills for the three pieces of pipe. He helped us put this piece of pipe back on the nose truck and took it on to his truck for the mill.

Q. Were you completely inside of the freight house station itself when this occurred?

A. Yes, sir.

Q. Did any of the back of the tubing extend through the door that you just came in from the car?

A. No, sir, the tube, when it lit, was inside the station on the floor.

Q. Fanno, at the front end of the tube, was at least 31 feet inside of the station?

A. No, I wouldn't say that, sir. See, the tube stuck over the nose of the truck about 12 feet.

Q. Wasn't Fanno on that side?

A. No, he was right where the tube was resting on the nose.

Q. The front end of the steel tubing, as it extended over the nose of the hand truck was about 31 feet inside of the warehouse door, is that correct?

A. No, the whole pipe would be inside the warehouse.

Q. Therefore the front end must be 31 feet inside?

A. If the pipe was 30 or 31 feet long—I can't state the length.

Q. You testified the waybill said 31 feet?

A. No, sir; I said 3100 pounds.

Q. What was the length?

A. No length stamped on the waybill. I would say the pipe was around 30 feet long, I would say.

Q. Then the front end was in the warehouse 30 feet then?

A. The front end of the pipe?

Q. Yes.

A. The full length of the pipe was in the warehouse.

Q. The front end of the truck was about 10 feet or 12 feet from the front end of the pipe, is that right?

A. Yes, sir.

Q. So that the front wheels were about 20 feet inside of the freight house proper?

A. There is only two wheels on the truck. They were pretty near in the middle of the pipe. That was to make it balance.

Q. When you got completely inside of the freight house, as you just testified, and you were pushing it along, the pipe started to slip, is that right?

A. No, sir. Now the question, if I understand it rightly, was how far the pipe was in the warehouse at the time. The pipe would start to slip before it would be clear in the warehouse. When it started to slip off the nose truck that would send it way ahead of the truck, and when it would land on the floor that would make the pipe inside the warehouse.

Q. When it started to slip, part of it was just going through the door?

A. Yes, we just started in the door of the warehouse on to the warehouse floor.

Q. Was Miller past the side of the door when it started to slip?

A. We was both past the side of it.

Q. Which way did it slip, forward?

A. Started right straight ahead. When I hung on to the truck, made the pipe go sideways instead of coming clear back again.

Q. That is when it hit you, is that right?

A. Yes, sir.

Q. And it landed on the floor of the warehouse?

A. Yes, sir.

Q. So that I get this straight without being repetitious too much; you had it laying on the hand truck with the front end extending out such as the pencil on my hand, and you were pushing it in and it started to slip directly forward and that kicked the truck out back toward you, is that right?

A. That's the way it would go, yes, sir.

Q. Is that what it did there?

A. Yes, sir, only your pencil, you hold your hand level with the pencil, but that is the object there.

Q. Show us how it happened.

A. For instance, this (indicating) would be the truck. The pipe would be beyond. On the nose of it, that stands up like that (indicating). When the pipe laying on there, if you didn't raise your truck up to make it on an even keel, the pipe would be going up in the air. You had to raise the handles in order to get the balance on your pipe.

Q. And make it easy to push too?

A. Yes, sir.

Q. After you got up to the freight house and

started to push in, as you were going along, did the front end go lower than the rear where you and Miller were?

A. I would say the unevenness of the floor made it start to slip on it.

Q. It did slip forward?

A. It started to slide forward, yes, sir.

Q. And it slid down and kicked the truck back?

A. Yes, sir, that's right.

Q. At the time it started to slip, were the handles of your truck higher than the nose of the front of the truck?

A. Well, that I couldn't state definitely; that would be impossible for me to state.

Q. So that I get this clear: it didn't slide to the right or left and start over either way, it went straight over the edge?

A. It did after it started to slide. That is what throwed the nose truck in my direction, by me holding on to the handle when the other men left go.

Q. When did they leave go?

A. As soon as it started to slide.

Q. As soon as it started to slide forward?

A. Yes, sir.

Q. You held on to your handle and when it kicked back, then it caught you on that side?

A. Yes, sir.

Q. The tubing rolled over to the left?

A. Fell over onto the floor.

Q. The tube didn't hit any part of you?

A. I don't think so.

Q. Didn't hit your foot?

A. No, sir.

Q. Didn't hit your hand?

A. No, sir.

Q. You would know if 1000 pounds hit you?

A. I would say.

Q. You said it kicked back with violent force. Did it knock you to the floor?

A. Didn't knock me down, no, sir; knocked the wind out of me.

Q. Then Mains was coming out of the office with the waybills and he saw the predicament you were in and he came over and helped you put the tubing back up on the hand truck, is that right?

A. Yes, sir.

Q. How did you put it back up on the hand truck this time?

A. Used the same procedure as we did in the car to get it back on to the truck.

Q. What was that?

A. By raising—run the truck up to the edge of the tube on the one end—

Q. Which end?

A. We have to raise it from the end next to the door.

Q. Which end did you do it on this occasion, Mr. Blair?

A. It would be on the end next to the platform door, sir. The truck was in the other door facing us.

Q. Who had a hold of the truck when you were raising it?

A. Why, I had hold of it—Mr. Miller and me both had hold of the truck. It takes some weight to pull that down to raise that up.

Q. Where was Mains at that time?

A. I couldn't state exactly where he had hold

of the pipe at the time when we was raising it back up to load it the last time. I think rightly Mr. Mains gave us a pull down when we started to raise the pipe up to get it on a balanced keel to load it on to his truck.

Q. When the tube was lying on the floor of the warehouse and you were trying to get it back up on the hand truck again, where was Fanno?

A. Fanno was helping with the pipe to help hold it on the truck so it wouldn't slide.

Q. Did either Mains or Fanno help you and Miller to get the hand truck under the pipe?

A. I think they did; I think all helping.

Q. You didn't just, you and Miller at one end and Mains and Fanno at the other end, pick the pipe up and set it on?

A. No, that would be impossible.

Q. Did you try it?

A. I wouldn't see how anybody could lift 1000 pounds.

Q. That is 250 pounds apiece?

A. We didn't try to lift the pipe.

Q. You didn't get the crowbar shown in plaintiff's Exhibit No. 1, and put that under so you could get the nose of the truck under?

A. No, sir, that wouldn't be necessary because you just stand your truck on end and roll the pipe on the nose of the truck and start raising it up.

Q. You did that?

A. Certainly. That is the way we did it in the first place.

Q. Did you put the nose of the truck under the middle of the pipe?

A. No, sir; no, sir; at the end of the pipe, then just rolled the pipe over on this steel nose.

Q. Then what happened?

A. Well, then, we bring it down as far as the truck would let us that way and block it and then slide the truck up under it with the help of these other men; that gets the tube on the balance of the truck then.

Q. Then you put it on the truck, the National Tube Company's truck?

A. Yes, sir.

Q. And went back and got the other one?

A. Yes, sir.

Q. Did you go through the same procedure with that?

A. Yes, sir.

Q. Did Mains help you load the third one?

A. No, sir, he didn't help unload anything out of the car.

Q. What time of the day was this occurrence?

A. Well, I would say it was around 10:30; I didn't watch a clock when I was working.

Q. Did you make a report to the agent?

A. Yes, sir.

Q. Did you tell him you were hurt?

A. I told him one of those tubes had slid on us and the truck kicked me in the side and knocked the wind out of me, but I didn't think I was bad hurt.

Q. When did you tell him?

A. Right after we got this on the Tube Mill truck.

Q. Did you have a watch in your pocket?

A. Yes, sir.

Q. Did you break the watch?

A. No, sir.

Q. Did you have a pencil or pen in your pocket?

A. I don't think I did. I carried a pencil in my cap.

Q. When you got hurt you didn't break your pencil?

A. No, it didn't hit me in the head; it hit me on the side.

Q. You didn't have a pencil in your pocket?

A. No, sir, I had a hole in my cap.

* * * * * * *

Q. When this pipe started to slip, did you try to get out of the way?

A. No, sir, I did not; I tried to hold on to the truck, as I stated, to keep from getting bad hurt, that was my whole intentions.

Q. Then when you testified yesterday that "Mr. Fanno and Miller left go and jumped and I tried to", you didn't mean that?

A. What do you mean I said? I tried to hold the truck.

Q. You didn't try to jump?

A. No, sir. I didn't say I tried to jump. I said I tried to hold the truck, to keep it from kicking me; that was my whole object because anything like that it kicks hard, because there is a force there.

* * * * * * *

Q. Did you give a statement to Mr. Carter, the Baltimore & Ohio claim agent, at Ellwood City on July 19, 1936?

A. I don't know what day it was but I gave a statement to Mr. Carter, yes, sir.

Q. You told him about the accident?

A. Yes, sir.

The Court:

Back up a little bit. 1936, did you say?

Mr. Casey:

1939.

The Court:

You said 1936.

Mr. Casey:

I beg pardon, I meant July 19, 1939.

Mr. Casey:

Q. Do you know whether you signed that statement or not?

A. I think I did.

Q. Did you tell him, "I am employed by the Baltimore & Ohio Railroad Company as trucker at Ellwood City, Pa., freight house, have been in the service off and on since 1928." Did you tell him that?

Mr. Hoffman:

If the Court please, I ask the original statement be produced and shown to the witness.

(Defendant's Exhibit "A" marked).

Mr. Hoffman:

If the Court please, counsel for plaintiff objects to any statement for the reason that it wasn't presented at Pre-Trial and marked as an exhibit.

Objection overruled.

Exception noted.

Mr. Casey:

Q. Did you tell Mr. Carter that?

A. I couldn't state exactly the words that I told Mr. Carter in 1939.

Q. Did you tell him—

Mr. Hoffman:

If the Court please, I ask that the witness be shown the statement.

The Court:

Well, the witness hasn't asked to see the statement. If he wants to refresh his recollection, I suppose he may do it.

Mr. Hoffman:

Refresh his recollection of the contents. He can't answer.

The Court:

Maybe he can or maybe he can't.

Mr. Hoffman:

I ask that you read the statement as a whole.

Mr. Casey:

I will read the statement paragraph by paragraph by prefacing my remarks whether he made such a statement.

Mr. Hoffman:

I ask that you identify the statement and show the man his signature on there.

The Court:

Proceed. You are perfectly within your rights, Mr. Casey.

Mr. Casey:

Q. Did you tell Mr. Carter you had been in the service off and on since 1928?

A. Yes, sir.

Q. Did you tell him, "Have worked regularly last time since December 6, 1935." Did you tell him that?

A. Yes, sir.

Q. Did you tell him, "On June 26, 1939, I started to work at my regular time, 8:00 A. M.," did you tell him that?

A. I think I did, sir.

Q. And is that correct?

A. I think so.

Q. Did you tell him, "I immediately started in unloading the various shipments which had arrived in the regular merchandise car from Pittsburgh, Pa?"

A. I have an idea I told him I took the seal first, because that is the first procedure you do.

Q. Did you tell him what I read to you?

A. Yes.

Q. That is a fact?

A. I told him I started to unload the car.

Q. The regular merchandise car from Pittsburgh, Pa.?

A. Yes, sir.

Q. Did you tell him, "One of the shipments in this car consisted of three pieces of pipe for the National Tube Company at Ellwood City, Pa."?

A. Yes, sir.

Q. Did you tell him, "I did not notice where this shipment was from"?

A. I don't think I said that. I don't think I said I didn't notice because I have to check the waybill.

Q. Did you or did you not tell him that, you can explain then.

A. No, sir, I didn't say that, I don't think.

The Court:

Q. You are not sure of it?

A. No, I am not sure of it, your Honor.

Mr. Casey:

Q. Did you tell him on the 19th of July, 1939, at Ellwood City, "All other shipments had been unloaded from the car before I started to handle this pipe"?

A. Yes, sir.

Q. Did you tell him, "I did not take particular notice, but I think all of these pipes were the same size", did you tell him that?

A. Yes, sir.

Q. And is that so?

A. Yes, sir.

Q. So that the second pipe was no larger or smaller than the first or third, is that right?

A. Well, I have an idea all the same size, just the way they was waybilled.

Q. Did you tell Mr. Carter, "They were about 25 feet long and weighed around 1000 to 1100 pounds apiece"?

A. I have an idea I told him that.

Q. Is that a fact?

A. I have an idea I stated it maybe in those words, yes, sir.

Q. Did you tell him, "Car inspector R. J. Miller, and section foreman D. Fanno were at the freight house and as these pipe were too heavy for me to handle alone I requested them to assist me"?

A. No, I didn't tell him that.

Q. You didn't tell him that?

A. No, sir.

Q. That is a misstatement then, he put it in deliberately or may be mistaken in quoting you?

A. I couldn't say the man put the statement in deliberately.

Q. That isn't a fact?

A. I don't think I stated it that way.

Q. Is that a fact?

A. What do you mean?

Q. Is it true or not that car inspector R. J. Miller and section foreman D. Fanno were at the freight house and as these pipes were too heavy for you to handle alone you requested them to assist you?

A. No, sir.

Q. That's wrong?

A. Yes, sir.

Q. Did you tell Mr. Carter, "I always made a practice to call on other company employees to assist me with shipments too heavy for me to handle alone"?

A. Not unless I was so instructed by my agent.

Q. You didn't tell him that?

A. I may have told him that much of it, but I know I never called on nobody to help me unless the agent told me to get them.

Q. You preface your remark by saying that is true what is in there but you say the agent told you first to get them, is that right?

A. Yes, sir. I have to obey my superior officers.

Q. And those were general instructions?

A. Yes, sir.

Q. Did you tell Mr. Carter, "We were handling these pipes direct from the box car in which they were loaded to the auto truck of the National Tube Company which was backed in at the platform at the east end of the freight house"?

A. Yes, sir, it had backed in there, yes, sir.

Q. That is the truck?

A. Yes, sir. It backed in. It would be more the south side of the warehouse, rather.

Q. Did you tell Mr. Carter, "We raised one end of the pipe with an automobile jack and shoved a two-wheel nose truck back under the pipe to a point where the pipe would balance on the toe plate and crossbars between handles of the truck with pipe laying lengthwise on truck", did you tell him that?

A. No, I didn't tell him I used an automobile jack.

Q. You didn't say that. You said "we"; did you say that?

A. No.

Q. "We raised one end of the pipe with an automobile jack"?

A. I didn't say that, no, sir, I am pretty positive I didn't say that.

Q. You might have said that?

A. It is a good ways off. I may have, but I don't think I did.

Q. You remember whether you used an automobile jack to raise the pipe?

A. No, I didn't use an automobile jack. How would you hold it on an automobile jack?

Q. You didn't do that then?

A. No.

Q. Did you tell Mr. Carter, "We then moved pipe on truck from car and through the freight house to auto truck", did you tell him that?

A. Did I tell him we moved pipe from car through the warehouse to the auto truck?

Q. Yes.

A. Yes, that is the way we took it through.

Q. Did you tell him, "The bed of the auto truck was a little higher than the freight house platform floor"?

A. Yes, sir, the truck is.

Q. That is the back end of it?

A. Yes, sir.

Q. Did you tell him, "The pipe laying on the nose truck was a little higher than the auto truck bed?"

A. Yes, sir.

Q. Did you tell him, "As we reached the auto truck Fanno was at the front end of pipe while Mr. Miller and I were at each side of the pipe practically opposite each other back at the handle of the nose truck"?

A. Well, which pipe are you referring to now in that? I don't know which one that is referring to now.

Q. Did you tell him that about any of the pipe?

A. Naturally, sure, that is the way we put them on the truck.

Q. That is true?

A. Yes.

Q. Did you tell him, "If I remember correctly I had hold of one handle of the nose truck with my right hand"?

A. Yes, sir.

Q. Did you tell him, "We continued to shove ahead with pipe on nose truck until the toe plate of nose truck struck against the rear end of the auto truck and when this occurred the pipe slid forward from the nose truck to the auto truck"? Did you tell him that?

A. Yes, sir, that is the way it went off the nose truck, yes, sir.

Q. Did you tell him, "As the pipe slid forward off the crossbar between the handles of nose truck, this threw all of the weight on to the toe plate which caused the nose truck to kick back and the handles to fly up and when this occurred the handle or some other part of the truck struck me in left breast"?

A. Oh, no, I didn't say the one that we was loading on the truck and then the truck kicked out; it is the one that went on the floor.

Q. Did you tell Mr. Carter as I read here?

A. Not the way it was read; I didn't state it that way, not for the tube that had fell. That's the way we loaded them on the truck.

Q. You didn't tell him that, "As the pipe slid forward off the crossbar between the handles of nose truck, this threw all of the weight on to the toe plate which caused the nose truck to kick back and the handles to fly up and when this occurred the handle or some other part of the truck struck me in the left breast"?

A. No, sir, I didn't state it that way, I am positive.

Q. Did you tell him, "There was a little film of grease on this pipe which made it very slippery so that when the toe plate of nose truck came in contact with auto truck the pipe slid forward off the nose truck without being pushed"?

A. Sure the pipe was greased, you bet it was greased.

Q. Did you tell Mr. Carter what I read and is that true?

A. I stated to you the pipe slid right away when we loaded on to Tube truck off the nose truck, they slid off the nose truck to the Tube Mill truck.

Q. Did you tell Mr. Carter what I read and is that what happened?

A. I didn't tell Mr. Carter I got hurt loadening the pipe on to the Tube Mill truck.

Q. You did not tell him that?

A. No, sir, I did not.

Q. Did you tell Mr. Carter, "There was nothing of a defective nature about the nose truck, station platform, or any other property of the company which contributed to the injury", did you tell him that?

A. No, I don't think I stated it in that way.

Q. You might have said that though, is that right?

A. I don't think I stated it in the way it is there.

Q. That is untrue what I stated?

A. No, I wouldn't say it is untrue.

The Court:

Where are we getting with all this?

Mr. Hoffman:

It doesn't contradict him in a single particular so far.

The Court:

That is something else. Wind it up. If it is going to be long I will ask you to limit it to contradictions.

Mr. Casey:

Q. Did you tell Mr. Carter, "After this occurred we proceeded to load the third one on to truck"?

A. We loaded all three on to the National Tube Company truck.

Q. Did you tell Mr. Carter, "After this occurred we proceeded—"

A. After what occurred?

Q. I just asked the question before.

A. Will you state the question again? I don't know what you mean when you say "After this occurred."

Q. I beg your pardon. Did you tell Mr. Carter, "We had already loaded one of the pipes on to the auto truck and were handling the second one when the injury occurred"?

A. Yes, sir.

Q. Did you tell him then, "After this occurred we proceeded to load the third one on to truck"?

A. Yes, sir.

Q. Did you tell him, "We handled all three of them in the same manner, which is the usual and customary manner to handle shipments of this kind and the same as I had handled many previous shipments of pipe"?

A. No, I never handled such pipe as that in the warehouse.

Q. Did you tell him that?

A. Yes, I suppose I did.

Q. Did you tell him, "My injury was not caused by an act or omission on the part of either of the men helping me"?

A. No, sir.

Q. Did you tell him, "Although I do not recall the points of origin and destination of all the shipments I had handled from this box car that morning, I recall that there were several from points

beyond the State of Pennsylvania''?

A. Naturally I couldn't remember every shipment that was in the car.

Q. Did you tell him that?

A. Sure, I couldn't remember all the shipments.

* * * * * * *

After Recess

CLARENCE W. BLAIR, the plaintiff, recalled, resumed his testimony as follows:

Cross Examination (continued)

Mr. Casey:

Q. Mr. Blair, as you were pushing the hand truck, you, Miller and Fanno, out of the car, when you got on the station platform was it hard to push?

A. I wouldn't say it was hard to push, no.

Q. Did you take the same route that you had traveled when you took the first pipe through?

A. Well, naturally you have to go the same way to take it in the same door.

Q. That was a long pipe, you could only get it through one way?

A. Well, yes, through the door into the warehouse.

Q. Did you follow the same route when you took the third pipe out of the car and through the platform and loaded it?

A. Yes, sir, I have stated that.

Q. When you went in to see the agent in the presence of Mr. Forsythe, what were his exact words to you?

A. As I have stated, I suggested that the pipe be left in the car and sent to the Tube Mill, that they were too heavy for me to handle and he said, "How much do they weigh?" I told him off the waybill. He told me to get Fanno and Mr. Miller to help me. I told him, I said I didn't know whether we could do it or not. He instructed me to do it or he will get someone else to do it.

Q. Did he say, "I instruct you" or—

A. I already stated he instructed me to do it or he would get someone else to do it.

Q. Did he say, "I instruct you", or say, "Now, Blair, I want you to get that out of there with the help you have or we will get someone else to do it." What words did he use?

A. That's pretty hard for me to say the words he used. He didn't use them harsh, as you are asking me; as much as to say get them out or he would get somebody to do the work if I didn't do it.

Q. If you and Miller and Fanno didn't do it?

A. Yes.

Q. You say he as much as said that?

A. I didn't say he as much as said it; I tell you he instructed me to do it or else get somebody else to do the work.

Q. Did he say, "If you don't do it I'll fire you"?

A. No, he didn't say, "I will fire you." The rules of the Railroad don't say that. He said, "I will get somebody else that would do it."

Q. Is that the way he said that?

A. That's the way I have stated it, is it not?

Mr. Casey:

That is all.

Recross Examination

Mr. Casey:

* * * * * * *

Q. Mr. Blair, on June 26, 1939, did you have in the Baltimore and Ohio warehouse at Ellwood City a little six-wheel truck for the moving of heavy objects?

A. There is an old delapidated one there, sir, if that's what you mean, with a broken wheel.

Q. Did you use it to move freight?

A. I used it for some things, flat objects that lay on it because no sides connected to it or anything.

Q. Would you use it for heavy objects?

A. I used it sometimes for tombstones and such as the like, that had a flat surface that stood on it.

Q. After the National Tube Company truck had backed up to the east end of the platform, was there any end gate that you had to put the tube over, or was it just an open rear end?

The Witness:

Your Honor, may I say there is no door on the east end of the platform. It is—

Mr. Casey:

Q. Wherever the truck was backed up against the platform was it an open end of the truck; there were no stakes or any door?

A. The truck backs directly into the door, there is no platform where the trucks load; on the south side of the warehouse there is no platform.

Q. Any end gate on the truck?

A. Yes, the end gate was let down on a level with the bed of the truck.

Mr. Casey:

That's all.

Redirect Examination

Mr. Hoffman:

Q. Which of the two trucks are you referring to about the other one that was in the warehouse?

A. Just which do you mean, Mr. Hoffman?

Q. Mr. Casey has interrogated you in regard to another truck.

A. There is another what they call a little six-wheeled. It would be like a dolly.

Q. I see.

A. It has got real small wheels in under it, just with a flat surface. It is just built flat, a flat top with six small wheels in under it.

Q. How high would that be above the floor?

A. I would say it would not be more than eight inches, around there.

Q. Did it have any handles on it or any way to control it?

A. Oh, no, sir, it is just a flat, six-wheel truck, the two wheels in the center being a portion larger than the two wheels at each end; that would be four wheels under on each end.

Q. That would tend to tip it either way?

A. It tips back and forward like that (indicating).

Q. That was a dolly, is that it?

A. They have different names for them; they call them dollies and rollers, and indicated as a roller for moving stuff with.

Q. What rollers did you have there?

A. Nothing but scrap pipe, scrap pipe, scrap that came from the Tube Mill, all different sizes and lengths, whatever we would get off a scrap car, we had them stuck in a barrel there.

Q. Could you roll this tubing on those rollers?

A. No, I think that would be impossible to try to roll one round tube with another round one. With one laying lengthwise you couldn't tell which way it was going to go, and one crosswise.

Mr. Hoffman:

I think that's all.

Mr. Casey:

With your Honor's indulgence—I think I covered this—I would like one more question:

Mr. Casey:

Q. As you were pushing the second piece of pipe, you were just pushing it along and it started to slip; is that all that occurred?

A. As I have stated, inside the door was a rough place, there was a board had been fastened to the floor and it was toed or beveled, rather, on the one side and was in the warehouse. As you go down over that, that would be a little bit, just a little bit of a down grade in the warehouse over the edge of that board. That had been there for some time until the warehouse floor was leveled by the Railroad Company bringing it up even with the platform.

Q. And you just were going down over that and it started to slip, the pipe, is that right?

A. The pipe started forward on the truck.

Q. You were going down a little grade, is that right?

A. When I went over this into the warehouse.

Q. Was it because you were going down a grade?

A. That would be not a grade there, sir; I say the board is just beveled off a little on the one side. That would be a way of letting you down without jumping off the board. That's what it is for.

Q. That was just inside the freight house door?

A. Yes, sir.

Q. Did you take the other two pieces of pipe over this same beveled board?

A. Yes, sir.

Mr. Casey:

That's all.

CLARENCE W. BLAIR, the plaintiff, recalled for further cross examination, testified as follows:

Mr. Casey:

* * * * * * *

Q. Have you done anything else except a freight handler in your life—is that your occupation?

A. Oh, no, sir.

Q. What is your occupation?

A. Well, in one way you just call me a laborer. That is all the work I have done. I worked in a steel mill, the Ellwood Forge, National Tube, I done construction work, highway work, and helped build bridges.

Q. What type of work had you done in the B. & O. Railroad Company from '28 to '39?

A. I worked some in the Ellwood City Forge.

Q. I mean for the Railroad?

A. You said from 1928.

Q. For the Railroad, what type of work have you

done since 1928 up until the time you got hurt in '39?

A. That's what I was trying to tell you. I said I worked in the Ellwood Forge Works, known as Ellwood Forge.

Q. You didn't work for the Railroad Company there?

The Court:

Q. Does the Railroad Company run the Ellwood Forge?

A. No. I thought he asked what work I did.

Q. He wants to know what you did for the Railroad Company.

Mr. Casey:

Q. Were you an engineer or fireman?

A. I didn't work for the Railroad Company from '28 to '35.

Q. You said you worked off and on for about nine weeks?

A. I said a couple of weeks or so for fellows that would be off; I didn't work steady.

Q. What type of work did you do?

A. Same type of work I was doing when injured.

Q. Freight handler in the freight station?

A. Yes.

Q. From December '35, up to and including July 3, 1939, you were a freight handler in the B. & O. freight station, is that right?

A. Yes, sir.

Q. Did you work continually for the company up to that time?

A. Yes, sir, from '35.

Q. You moved lots of freight at that freight house?

A. Yes, sir.
Q. That was laboring work, wasn't it?
A. Yes, sir.

Mr. Casey:

That's all.

Mr. Hoffman:

Plaintiff rests.

Mr. Casey:

If your Honor please, at this time I move for a compulsory nonsuit and would like permission to argue it.

Noon recess.

Afternoon Session

Motion refused.

Mr. Casey:

May I have an exception, please?

DEFENDANT'S CASE

Mr. Casey opens to the jury on behalf of the defendant.

DR. PAUL R. SIEBER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Mr. Casey:

Q. Your full name, please?
A. Paul R. Sieber.

Q. And where do you reside, Doctor?

A. 1406 Browning Road, Pittsburgh.

Q. Your profession?

A. I am a physician, specializing in surgery.

Q. Graduate of what school?

A. Johns-Hopkins Medical School, 1911.

Q. Any specialty?

A. General surgery.

Q. Are you duly licensed to practice in Pennsylvania?

A. I am.

Q. Are you affiliated with any institutions?

A. I am surgeon at Mercy Hospital.

Q. Do you know Clarence Blair, the plaintiff in this action?

A. I do.

Q. When did you first see him professionally?

A. I saw him first September 29, 1939—I beg your pardon—September 5, 1939, the first time.

Q. And where was that?

A. At my office at the Mercy Hospital.

Q. Did you take a history from him then?

A. I did.

Q. What history did he give you?

A. Said that he was unloading some freight at the freight station in Ellwood City on June 26, 1939, and he was handling a ten and a half inch pipe on a truck which swung around and struck him on the chest on the left side.

* * * * * * *

ROBERT J. MILLER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Mr. Casey:

Q. Your full name, please?

A. Robert James Miller.

Q. Where do you live.

A. I live at Callery.

Q. Pennsylvania?

A. Yes, sir.

Q. By whom are you employed?

A. By the B. & O. Railroad.

Q. In what capacity?

A. Car inspector at Ellwood City.

Q. Were you so employed on June 26, 1939?

A. Yes, sir.

Q. Do you know Clarence Blair, the plaintiff here?

A. I do.

Q. Do you know of an occurrence in the Ellwood City freight station concerning the movement of certain seamless tubing on or about June 26, 1939?

A. Yes, sir.

Q. Will you tell the Court and jury what occurred on that day?

A. Well, on that day we had some tubes that came in there and they were large tubes and he called on me to help him.

Q. Who wanted you to help him?

A. Mr. Blair. Said they was too heavy for him to handle himself, so he got Mr. Fanno and he and I, we unloaded the first tube all right.

Q. How did you move the first tube?

A. Why, we jacked it up and got the nose truck under the center of it and took it out through the freight house and put it on to the Tube Mill truck.

Q. Who are "we", when you say that?

A. Well, Mr. Blair and myself and Fanno.

Q. As you took the first tube on this day, what were your various positions with respect to the hand truck and the tube?

A. You mean where were we stationed?

Q. Yes, that's right?

A. I was on one side of the truck and Mr. Blair was on the other side.

Q. And where was Fanno?

A. Fanno was ahead of the truck balancing the tube.

Q. Now, with respect to the handles of the hand truck, where was the tube with respect to those, was it lengthwise on the truck?

A. Sure, it was lengthwise.

Q. Did it extend on out past the handles?

A. Past the handles and past the nose of the truck; it was about the center of the tube.

Q. So that it extended beyond the nose and beyond the handles in the rear?

A. Yes, sir.

Q. You pushed it over to the automobile truck, is that right?

A. Yes, sir.

Q. Pushed it out the door of the box car through the station platform?

A. Yes, sir.

Q. And placed it on the truck?

A. Placed it on the truck.

Q. That is the first one?

A. That is the first one.

Q. Then what did you do?

A. Well, we went back for the next one.

Q. Who are "we"?

A. The same gang, the three of us, Mr. Blair and Fanno and I, and we done likewise with it.

Q. You loaded the second one on the hand truck?

A. On the nose truck.

Q. The same truck?

A. Yes, sir.

Q. Did you use the same jack?

A. I don't remember whether we used a jack to get it up or not now.

Q. You did put it on the truck, is that right?

A. Yes, sir.

Q. Then what did you do?

A. Well, we started for the Tube Mill truck again with this tube, Blair on one side and me on the other and Mr. Fanno ahead, and on our way going out Mr. Main has just come from the office and I recollect that he took the back end and kind of helped to steady the tube until we got it on his truck.

Q. Then what occurred?

A. On the way going to the truck she started to slip and after she got over-balanced, it was pretty heavy, 1000 pounds or more, on the end of the nose truck to hold, so we let go of it. Blair, I understand he tried to hold the handle of the truck but it kicked out and flopped over and hit him. He had a pencil sticking in his pocket. It kind of hurt him all right. It knocked his wind out. He pulled out the pencil and said, "Look here, that broke my pencil."

Q. Where did this occur?

A. In the freight house by the truck.

Q. Just as you were putting it on the truck?

A. Yes.

Q. Where were the front wheels of the hand truck with reference to the automobile truck when it started to slip?

A. Well, I imagine about ten feet.

Q. Ten feet inside the freight house, is that right?

A. No, towards—from the wheels of the truck to the auto truck, to the end gate of the automobile truck.

The Court:

Q. So the end of the pipe was just about there?

A. Yes, the end of the pipe had started in the truck.

Mr. Casey:

Q. Did it start to slip forward?

A. Yes.

Q. Did it go on into the truck?

A. Went into the truck. After she got over the balance of the crosspiece in the nose truck, that is where it was too much weight for us to hold, it flopped over.

Q. The front end of the tube was in the automobile truck?

A. Started in the automobile truck.

Q. And that's where it landed, is that correct?

A. Sure.

Q. What are your duties in and about the railroad?

A. I am car inspector.

Q. You have, on occasions, helped with the handling of heavy pieces of freight?

A. Yes, sir.

Q. How often?

A. Quite often.

Q. Prior to June 26, 1939, did you ever help Clarence Blair with heavy pieces of freight in the Ellwood City freight house?

A. Yes, sir.

Q. Prior to that day had you ever helped him move pieces of tubing of this nature?

A. Well, we have moved tubing but not as large as this piece.

Q. What did you use for that?

A. A nose truck.

Q. On the day in question, where were you when Blair came to ask you to help him?

A. I was right around the freight house there amongst the cars when he hollered on me; that's where they set off the cars there.

Q. Is that what he does on occasion, he hollers at you to come in?

A. Sure, he hollers for me to help.

Q. Did you know what you were going to move this day?

A. Not until I got in there.

Q. After the tubing slipped, what did you do next?

A. I don't recollect.

Q. Did you move the other one, do you know?

A. Oh, yes, we got the third one out, sure.

Q. Who moved that one out?

A. Same gang, Mr. Blair, Mr. Fanno and myself.

Q. Did you have any difficulty with it?

A. No.

Q. Did you put it on the truck?

A. We put it on the truck.

Q. You say you usually move a piece of tubing for the National Tube Works by hand truck, is that right?

A. Yes, sir.

Q. And do you lay it across the same as you did in this instance?

A. Yes, sir.

Mr. Casey:

Cross examine.

Cross Examination

Mr. Hoffman:

Q. Mr. Miller, how long have you known Clarence Blair?

A. For about ten years.

Q. And what is your age, Mr. Miller?

A. My age?

Q. Yes, sir.

A. I am sixty-six past.

Q. And how long have you been with the B. & O. Railroad?

A. Thirty-eight years today I was employed by the B. & O.

Q. Today. Did your job as car inspector require you to help move freight?

A. It don't require it but if I am asked to do it, why I will do anything I am asked to do.

Q. Was Mr. Blair your superior in any way?

A. No.

Q. And do you know what caused that tube to slip, Mr. Miller?

A. Well, the only thing I can account for that it was greasy.

Q. Pretty hard to hold on a truck?

A. Pretty hard to hold on, steel against steel, you might say.

Q. Did you ever notice Mr. Blair having the bronchial infection before this accident, Mr. Miller?

A. No, sir.

Mr. Hoffman:

I think that's all, thank you.

Redirect Examination

Mr. Casey:

Q. What caused the handle to fly out of your hand?

Mr. Hoffman:

Just a minute. He already told you that—go ahead.

A. Well, the weight of the tube. I didn't want to get hurt myself. When I seen we couldn't hold it, why I had to leave go.

Mr. Casey:

Q. Was the weight of the tube on it, pressing on it?

A. Yes, sir.

Mr. Casey:

That's all.

Recess

After Recess

DOMENICK FANNO, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Mr. Casey:

Q. Your full name, please?

A. Domenick Fanno.

Q. Where do you live?

A. Ellwood City.

Q. Who do you work for?

A. B. & O., Baltimore & Ohio Railroad.

Q. What do you do?

A. Section foreman.

Q. What did you do on June 26, 1939; who did you work for then?

A. Why, my gang was off that day.

Q. Did you work for the B. & O. then?

A. Yes. My men working by the week, five days a week; I work six days.

Q. How old are you?

A. Sixty now.

Q. Did you help Clarence Blair and Mr. Miller move some seamless tubing?

A. Three pieces.

Q. Will you tell the Court and jury just what happened?

A. Why, we went and get that pipe on the truck. We put him on the truck and come back to get the other one. When we get the other one and we was near the truck we give a push and when we give a push the little truck went against the big truck and the pipe went on the truck and truck kicked back and hit Mr. Blair in here (indicating).

Q. Did you have any trouble with the first piece of pipe?

A. We had no trouble with the first piece, no. Second piece, just we give him push and little truck went against the big truck and jumped back and hit Mr. Blair in here (indicating).

Q. Did you get the third piece of pipe on?

A. Yes, we did.

Q. What did you use to get it out?

A. Why, we get with the automobile jack. Mr. Miller raise him up and we put the little car in the middle of the pipe.

Q. Which car did you put under?

A. Two-wheel car.

Q. The hand truck?

A. Yes.

Q. Is that the same one you used on the second piece?

A. Yes, always one truck all the time.

Q. And as you went across the station platform itself, the floor, where were you with respect to the second piece of pipe when you were taking it out?

A. I was there, all three were there all the time.

The Court:

Q. Where were you, in the front or back?

A. I was in the front all the time.

Mr. Casey:

Q. Where was Miller and where was Blair?

A. Miller was other side and Mr. Blair was side of the pipe, had the handle.

Q. Back at the handle, is that right?

A. Yes. When we give shove the pipe, the car went and heavy weight of the pipe when hit against

the Tube Mill truck, why the car kicked, went way out and hit him here (indicating).

Q. When you took the third piece of pipe out, who took it out of the car and across into the truck?

A. Which one?

Q. The third piece that day?

A. I was there too.

Q. You did it the same way?

A. The same way.

Q. You in front and Miller and Blair back at the handles?

A. Yes, the same way.

Q. How did Blair call you to come and help him this day?

A. Why, you see I had piece of timber 14 feet long and I was going to ship this piece of timber on the railroad and Blair had a big pipe and say, "Help me", and I did help him because B. & O., and he was working for the B. & O. and I was working for the B. & O.

Q. Had you helped him before on heavy pieces of freight?

A. Lots of times.

Q. And you helped him then?

A. All the time when have big piece, Mr. Forsythe, he bring me, told me to bring my men. I bring my men and help him. If I by myself I go myself.

Q. Before this date did you move any pieces of pipe with Blair of the same size?

A. You see, Tube Mill bring the truck, some has long truck, I bring my gang and help them put it in the car.

The Court:

I take it he says he formerly unloaded from the Tube Mill truck to the railroad car, but he hasn't answered your question.

Mr. Casey:

Q. Did you ever help Blair take any pipe about the same length and weight as this from the car out through the station and load it on the truck or deposit it on the station platform?

Mr. Hoffman:

Don't make it so long. That is leading the witness.

A. We sometimes got small, sometimes littie long, you know; we no get the same size.

Mr. Casey:

Q. But did you ever help him take pipe from the car out into the platform?

A. Yes.

Q. And into a truck?

A. No, coming in the car. Tube Mill truck and he no can handle it. I get my gang and we get a hold of the pipe and put them in the car.

Q. Did you, yourself, ever help Blair take pieces of seamless pipe from the railroad cars out into the station, help him unload it?

A. I never seen him with this pipe here.

Q. Is this the only time you ever helped him?

A. That's right, because small pipe don't call me; long pipe, heavy piece,—the other day was a big counter shaft, Mr. Forsythe call me and I went with the gang and helped him.

Q. When you put the second piece of pipe into

the automobile truck, it was stopped, backed up against the door, is that right, of the station?

A. Well, put all three pieces of pipe the same way and they went the same way.

Q. The automobile truck was stopped?

A. The automoible truck was at the door, stopped, yes.

Q. You pushed the hand truck with Miller and Blair, right across the station platform until you got to the truck is that right?

A. Yes. I was at the end of the pipe in the front.

Q. Is that where the accident happened?

A. Sir?

Q. The accident happened right over by the automobile truck?

A. The pipe was on the truck, on the Tube Mill truck, but you see before we get to that we give him push and pipe go right in all the way on the truck, and when little truck hit big truck why the truck kicked.

Q. After the pipe came to rest was it on the truck?

A. On the truck, all three on the truck, one never fall down on the ground.

Mr. Casey:

Cross examine.

Cross Examination

Mr. Hoffman:

Q. You say that you skidded the pipe from the truck on to the bed of the automobile truck?

A. Yes, sir, all three right on top of it.

Q. Which one?

A. All three.

Q. All three?

A. Yes, sir.

Q. If it went on the automobile truck how did it kick the little truck back?

A. Why, I tell you. You see this here little truck was sitting right in here (indicating), little truck hit right in there (indicating) and kick back.

Q. It hit the pipe on the truck?

A. No, sir, hit against the Tube Mill truck and kick back, the weight of the pipe kick the truck back. Mr. Miller, he went away and it catch Mr. Blair.

Q. Was that pipe pretty heavy for you three men to handle?

A. Oh, no; no, sir. I got three men in my gang and I raise him up, 39 feet, 1300 pounds.

Q. With the men, with your gang?

A. Three men and the foreman, we get hold of him and raise him up.

Q. Your gang wasn't working that day?

A. No, sir, they work five days a week.

Q. You say you raised this pipe up in the car with the automobile jack?

A. Yes.

Q. Where did you get the automobile jack?

A. We got them in the station.

Q. Where did you put the automobile jack?

A. Right in the end of the pipe, Mr. Miller put it, and raise them up and we put the car in the middle of the pipe.

Q. Would the automobile jack hold the pipe up?

A. Oh, yes. The other day—

Q. We don't care about the other day.

A. Oh, that raise anything, it heavy, it's strong.

Q. How high did you raise the pipe up?

A. You see, with the nose of the truck and raise them up a little bit and slap the automobile jack and jack them up, come up.

Q. You put the nose of the truck under?

A. Under pipe?

Q. So it would get high enough for the head of the jack to fit inside the tube?

A. That's right.

Q. Against the upper wall?

A. Right in the end.

Q. Right in the end, yes.

A. Yes, sir.

Q. Your jack would be at an angle, then?

A. Sir?

Q. Your jack would be at an angle, then?

A. I don't know what you mean.

Q. Well, how big was the head of that jack, that automobile jack, how big was the top?

A. Oh, it's—I never measure—just a regular automobile jack, use them for everything.

Q. The bottom of the jack sat on the floor, did it?

A. That's right.

Q. Outside the end of the pipe?

A. Outside the end of the pipe.

Q. But the top of the jack was over to one side under the pipe?

A. You see, you raise them up with the nose of the truck so you get the jack under, then you raise him up.

Q. You put it on this, then you put it on the nose truck?

A. On the nose truck, right in the middle of the pipe.

Q. How did you get it under the pipe?

A. Raise him up with the automobile jack and so put the nose truck under the pipe.

Q. How long have you worked for the B. & O. Railroad?

A. I have been working for the B. & O. Railroad twenty-nine years and Virginia Railroad nineteen years.

Q. You lived in Virginia then before you came here?

A. Yes, Roanoke, Virginia.

Mr. Hoffman:
That's all.

CARL V. MAIN, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Mr. Casey:

Q. Your full name, please?

A. Carl V. Main.

Q. How old are you?

A. Forty-five.

Q. Where do you live?

A. Ellwood City.

Q. What is your occupation?

A. Truck driver.

Q. Employed by whom?

A. National Tube Company.

Q. Were you so occupied on June 26, 1939?

A. Yes, sir.

Q. Did you help Clarence Blair, Mr. Miller and Fanno move some seamless tube of your company's at the Ellwood City freight house on June 26, 1939?

Mr. Hoffman:

Objected to as leading.

The Court:

Well, it is preliminary. Answer it.

A. Yes, I was there.

Mr. Casey:

Q. Will you tell the Court and jury just what happened?

A. Well, whenever I went down for freight in the morning, why, I backed up to the station, went into the window to get my bills and as I walked going through, why, the boys was coming out with one tube on a truck.

Q. Who do you mean by "the boys"?

A. Miller, Mr. Fanno, and Mr. Blair. And I went ahead on in and got my bills. When I came out that tube was on.

Q. On where?

A. On my truck, National Tube Company's truck. And they was coming out of the car into the station with the second tube as I came out of the station after lifting my bills.

Q. That is out of the station office?

A. Yes, I came out of the station office, yes, sir.

Q. From whom did you get those bills, do you know?

A. I imagine Mr. Forsythe. I am not sure, but whoever was at the window.

Q. In the office?

A. In the office.

Q. Then what occurred?

A. Well as I say, I came out and they already had one tube on the truck and this ws the second tube and just as I came out of the office, why, they was putting the one on the truck and I came around behind this tube that was sticking back of the back handles of the truck and I think I laid my hand on it to help balance a little just before they got to the truck and as we got to the truck--

Q. What was the position of the remainder of the men as you took the second tube towards your automobile truck?

A. What was the position?

Q. Where was Fanno, where was Miller, where was Blair?

A. Fanno, I believe, was at the head of the tube and Mr. Miller and Mr. Blair was one on each side of the tube and the truck, and the tube was in the center of them.

Q. Lengthwise on the hand truck?

A. Longway, yes, sir.

Q. Did you have to reach down to steady it?

A. Just as I was coming out there they was very near to the truck with it. I just kind of helped balance it a little.

Q. It was lengthwise on the hand truck then?

A. Yes.

Q. Was it in view from the time it came out of the car until it came to the automobile truck?

A. I was in the office. I just came out from the office as they were coming through the wareroom with it.

Q. Were they in the wareroom with the tube when you first saw them?

A. Yes, sir.

Q. What part of the wareroom?

A. Well, I would say very near the center.

Q. When you first saw them?

A. Yes.

Q. You walked over to where they were?

A. Absolutely. They just kept right on going and I kept coming to them.

Q. What happened?

A. They started it on the truck and they had it pretty near on the truck. My version of it is just as we got up to the truck bed, why, it kind of sloped a little and it kicked back.

Q. What kicked back?

A. This truck, this two-wheel truck it was carried on.

Q. What did it do then?

A. I know it came to the end, that's where I was at, and I know it struck Mr. Blair on the side here, I know that, some part of the truck; I wouldn't say it was the handle or the leg, I know it was some part of it.

Q. Did he complain of being struck?

A. Yes, sir, right then.

Q. The hand truck, then, came out to the end of the tube?

A. Of the tube, yes, sir.

Q. Back where you were?

A. Yes, sir.

Q. Was this right at the automobile truck?

A. Yes, sir.

Q. Then what occurred?

A. Well, that was all of that. It was practically on my truck then.

Q. How much of it was not on your truck, are you able to state?

A. Well, I would say not over eight or ten feet. You mean sticking out the back end?

Q. Sticking out the back end?

A. I would say not over eight or ten feet.

Q. Was the other tube loaded on this day?

A. Yes, sir.

Q. And what type of vehicle were Blair, Fanno and Miller using for the third piece of tubing?

A. The same truck, as far as I know; I know it was a small truck.

Q. A hand truck?

A. It is a hand truck, that's right.

Q. They used that for all three pieces of tubing?

A. I didn't see the first one.

Q. It was on the truck when you got there?

A. Yes, sir, it was on, but the second one and third one.

Q. On the second and third they used a two-wheel hand truck?

A. That's right.

Mr. Casey:

Cross examine.

Cross Examination

Mr. Hoffman:

Q. Mr. Main, weren't you in the office getting your bills when they loaded the second, when they brought the second tube out there?

A. I may have been in the office when they started through the wareroom with it, but I came out of the office, out of the door, as they were going through the wareroom with it.

Q. Had it already fallen when you got out there?

A. Not unless it fell twice.

Q. I don't suppose it fell twice, though?

A. Unless it fell before I came out and I am positive that that was the second tube that I saw.

Q. Where were they when you went into the office to get your bills?

A. With the first tube?

Q. Yes.

A. They was right there just about—they was just about ready to load it on my truck. As I backed into the door they had it on the two-wheel truck there.

Q. Then you went into the office?

A. That's right.

Q. You didn't help load this pipe?

A. The first pipe, no.

Q. Or the second one?

A. Well, like I say, I might have laid my hand on the balance of it.

Q. Don't you know whether you did or not?

A. Well, I know I did, for I jumped there a little when the truck flew, I am positive of that.

Mr. Hoffman:

That's all.

Redirect Examination

Mr. Casey:

Q. Had you ever seen Clarence Blair prior to this time load large seamless tubing and handle it on the two-wheeled hand truck?

A. You said "load". That means—

Q. Handle it?

A. Well, yes.

Q. And that was before this accident?

A. Yes.

Q. You haul tubing of all kind and description, is that right?

A. Absolutely, that's true.

Q. You haul some of that tubing from the B. & O. Station in Ellwood City to your plant?

A. Generally from the plant to the station more so than from the station to the plant.

Q. You have seen how it is handled around there?

A. Yes, sir.

Q. How is it handled?

A. Mostly always the way it is handled by two-wheeled truck.

The Court:

Q. Did you ever see Blair handle it with a two-wheeled truck before this accident?

A. Tubing? Why, yes. We always loaded cars with it, with two-wheeled trucks.

Q. You saw Mr. Blair do that?

A. Yes, sir, everybody.

Mr. Hoffman:

Q. Did you ever see him load pipe this big before?

A. Load? Well, yes. Well, I wouldn't say as long as it quite, but I would say heavier in diameter, maybe, all kind of tubing, anything to be shipped pretty near have to haul it.

Q. Isn't it a fact most of that stuff was loaded in the car at the plant?

A. Well, a lot of it.

Q. Yes.

A. Was unloaded at the plant.

Q. Isn't it a fact the heavy pieces were taken up to the plant right in the car?

A. They have sent it up, sure, they sent some up.

Mr. Hoffman:

That's all.

PAUL B. FORSYTHE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Mr. Casey:

Q. Your full name, please?

A. Paul B. Forsythe.

Q. And where do you live?

A. Ellwood City, Pa.

Q. By whom are you employed?

A. Baltimore & Ohio Railroad.

Q. In what capacity?

A. At the present time agent and yard master.

Q. How were you employed on June 26, 1939?

A. Cashier and chief clerk.

Q. Where?

A. Ellwood City.

Q. Who was your immediate superior?

A. Mr. Kimes, L. R. Kimes.

Q. Is Mr. Kimes dead?

A. He is. He died on September 12th.

Q. Of this last year?

A. This year, 1942.

Q. Do you know Clarence Blair?

A. Yes, sir.

Q. Did you know him on or about the 26th of June, 1939?

A. Yes, sir.

Q. Were you in the freight house on that day?

A. Yes, sir.

Q. Are you able to state what kind of equipment was present at the Baltimore & Ohio Railroad Company's Ellwood City station on June 26, 1939?

A. Yes, sir. We have four large four-wheeled trucks? We have two—had two two-wheeled nose trucks, one of them we called a barrel nose truck and other one was box truck.

Q. Those are called hand trucks?

A. Hand trucks, yes, sir. And we had a six-wheeled dolly and a one-wheeled dolly and we had either two or three pinch bars.

Q. Pinch bars, what are they? What material are they made of?

A. Made of steel.

Q. Crowbars?

A. Something like a crowbar, yes, sir. We had

an automobile hydraulic jack and we had a barrel containing a lot of rollers.

Q. Those were round cylinder rollers, is that right?

A. Yes, sir.

Q. Are you able to state the condition of that equipment on June 26, 1939?

A. That equipment was in good condition. There was a little chip out of the six-wheeled dolly. It didn't hurt it any as far as operation was concerned. The wheels are a flat wheel. Just a little chip out of one side of it.

Q. On June 26, 1939, did Clarence Blair come into the freight office in the presence of you and Mr. Kimes and have any conversation with reference to the unloading of three pieces of seamless steel tubing?

A. No, sir.

Q. Had you ever unloaded freight at this station?

A. Yes.

Q. Have you ever assisted Clarence Blair with heavy pieces?

A. Yes, sir, I have.

Q. What instrument would you use, or appliance?

A. On large pipe, that is dry pipe, we would use a nose truck. Now, the nose truck, we would up end it and run the pipe over on to the nose and use that nose truck for a lever to raise it up and then on dry pipe we would use the other truck, the other nose truck, and haul it out of the car into the warehouse and put it on the other truck. On oiled and greased—

Q. What do you mean, "the other truck", we got three trucks?

A. The other nose truck. See, we have two nose trucks. That is dry pipe, heavy dry pipe, raise it up, use it as a lever to raise it up and use the other nose truck to run under it and bring it out of the car and in the warehouse and on the National Tube Company truck. On oiled pipe we use a nose truck, roll it over and raise it up and put this one-wheeled dolly under it, or rollers, if it is real heavy wall we use the rollers to get it out of the car and into the warehouse. Then we have to use the nose truck and this dolly to put it under the pipe to get it on the National Tube Company truck. This dolly, understand, this one-wheeled dolly, has a wooden frame, the boards are two by four and boards are four inches wide, and it is about that long (indicating) and the oiled pipe is not apt to slide on this dolly as it would on a nose truck; the nose truck has a steel strip and also rests on another steel strip near the handles. It can be easily balanced on the nose truck and easily balanced on the other, that's the dolly.

Q. Have heavier pieces of seamless tubing than that is involved been handled out there?

A. Yes, we have. We had tubing with one inch wall.

Mr. Hoffman:

Objected to as leading.

The Court:

Most leading. It is answered now.

Mr. Hoffman:

Haven't said anything of the length of it.

A. We had tubing there from 33 to 34 feet long.

Mr. Casey:

Q. You handled that with the equipment there, is that right?

A. Yes, sir, we do.

Q. When there is a heavy shipment of freight to be moved, how is it moved?

A. A heavy shipment?

Q. Do you furnish any assistance?

A. Yes, we furnish assistance. Whenever there is a heavy shipment Mr. Blair was instructed by Mr. Kimes and also myself, any heavy freight, too heavy to handle, to get in touch with us or if Mr. Fanno, or Mr. Miller was available to ask them to help him out.

Q. Have you helped Blair on occasions too?

A. Oh, yes, lots of times when Mr. Fanno wasn't available I went out and helped and Mr. Miller was there to help too. Mr. Kimes instructed me to go out and help him on heavy shipments of machinery and such as that, sometimes we had heavy pieces of marble and heavy blocks of steel; we used the six-wheeled dolly on it.

Q. Is there any appreciable amount or volume of this steel pipe that passes through the warehouse, incoming and outgoing?

A. Yes, sir, there is.

Q. Was there on June 26, 1939?

A. Just this one particular shipment. We had them both before and after.

Q. And it was customary to move heavy tubing, is that right?

A. Yes, sir, it moves every week or so.

Mr. Casey:

Cross examine.

Cross Examination

Mr. Hoffman:

Q. This equipment you had there wasn't in any way adequate to handle these big lengths of pipe, was it, Mr. Forsythe?

A. Yes, it was.

Q. And it is dangerous to undertake to move lengths of pipe of that sort with these dollies and these two hand trucks that you have there, isn't that right?

A. No, sir, not if you are careful it is not.

Q. Not if you are careful?

A. Careful. You wouldn't—

Q. You think it is safe practice to move a 30 foot 10 inch piece of seamless tubing on a truck that is five feet long, do you?

A. On the dolly I would use.

Q. You would put it on the dolly?

A. Yes.

Q. The dolly doesn't have handles?

A. The dolly doesn't need to have handles to handle a 30 foot piece of pipe.

Q. It has a flat surface?

A. Yes.

Q. No way to hold it on the dolly?

A. You have the pipe on the dolly; you hold on the pipe.

Q. It could easily roll off the dolly?

A. No, sir, you could block it on the dolly, put a block on each side, tack on two by fours we have in the warehouse.

Q. Lay pieces of two by four on?

Mr. Casey:

He said nail them on.

A. Nail a piece on, tack it with the nails, tack it down. It has a frame on there for that purpose.

Mr. Hoffman:

Q. There are six wheels on that dolly?

A. No, the one we are speaking of right now, it is only a one-wheel dolly.

Q. Oh, one-wheel dolly?

A. Yes.

Q. So you would move a length of pipe weighing 1000 pounds, 30 feet long on a one-wheel dolly?

A. Oiled pipe, yes. It is easily balanced on there. One man can handle that himself going across the floor.

Q. One man can handle it?

A. He can push it, that will tip just a little bit, no danger of it rolling over. When you are shoving it yourself it couldn't tip to hurt anything.

Q. Is the top of that dolly square?

A. Yes, sir.

Q. How big is the top of it?

A. I would say about 12 or 14 inches square.

Q. 12 or 14 inches square?

A. Yes, sir.

Q. You would put a 30 foot pipe on a dolly 12 or 14 inches square with one wheel?

A. It is not a wheel, it is a roller.

Q. Oh, it's a roller?

A. Yes, sir.

Q. That's the doily there (indicating) is it not, with the roller?

A. That's it, yes, sir. That's about 12 or 14 inches across this way (indicating). This way (indicating) it is longer, about 18 that way.

Q. About 18 inches?

A. Yes, sir. That's the bottom portion of it there.

Q. So that pipe would extend 14 feet on either side of that dolly, or more?

A. Yes.

Q. And one man can handle that?

A. One man; after it is on the truck one man can shove it across the warehouse floor.

Q. There is no way to regulate the course of that, is there?

A. Oh, yes, sure, steer it any place you want.

Q. It is just a roller, isn't it?

A. A roller on the dolly.

Q. Yes. And that doesn't have a solid top, does it?

A. Yes, sir.

Q. Does the picture here show it with a solid top?

A. That shows the bottom of it.

Q. Shows clear through the truck, doesn't it?

A. Yes, I mean the top of the dolly, it doesn't show the top of the dolly. There is a two by four up on top so that you can tack your other braces on so your pipe won't move.

Q. It isn't flat?

A. It is not solid across, no, sir.

Q. Just two by fours on either side?

A. Two by fours on either side. Then you have your other frame in addition to that too, that is along where the roller is fastened on to.

Q. How long has the B. & O. at Ellwood City used that type of equipment to haul heavy stuff?

A. Well, as near as I can say, around about 1920.

Q. And you got a rough floor there in the warehouse, don't you?

A. No, that is not a rough floor.

Q. It has sunk, hasn't it?

A. No, sir.

Q. There is a strip nailed on at the door that causes it to have to be beveled off to get down on the floor of that warehouse?

A. No, sir.

Q. That isn't a fact?

A. No, sir.

Q. That was the fact, though, in June, 1939, wasn't it?

A. No, sir.

Q. Never has been the fact?

A. It was in the early part of '39, but the warehouse had been raised up and that had been taken out in the spring of '39.

Q. So they repaired the floor of the warehouse in the spring of '39?

A. Yes, sir.

Q. When did they repair it?

A. Along in March or April.

Q. A month of two before this accident, is that right?

A. Well, this accident I didn't know anything about until the 3rd of July.

Q. Oh, you didn't know anything about it until the 3rd of July?

A. No, sir.

Q. Why not?

A. Mr. Blair hadn't said anything about it.

Q. You didn't know anything about it?

A. Not until the 3rd of July '39, the day before the 4th is the first I knew anything of it.

Q. So you don't have a very good recollection of what occurred on that day, the day of the accident?

A. I haven't said yet what occurred on the day of the accident. I know what equipment we have. You didn't ask me anything of what occurred; you asked what equipment we had out there.

Q. You don't know what occurred on that day and didn't know until the 3rd of July?

A. No, I didn't know what happened until the 3rd of July.

Q. So there is nothing to set that day out in your recollection other than any other day?

A. Oh, I know from the records that Mr. Main was in and got bills for the shipment.

Q. And when Mr. Blair wanted to get any help he asked you or Mr. Kimes for help, did he not?

A. He did when there was no one around. If the men were out in the warehouse or around where he could see them, he asked them to come and help him.

Q. He had no right to take anybody off their job without permission of you or Mr. Kimes, did he?

A. Yes, sure he did. We can't go to Baltimore to get permission to do a little bit of work. We are all working for the Baltimore & Ohio Railroad.

Q. To pull a car inspector or section foreman off his job, Mr. Blair couldn't do that without express authority from you or Mr. Kimes, could he?

A. Yes, he could; he could ask them. If they

refused, he could come and tell us and we would go out.

Q. Did you give him permission to go to different departments and disorganize their work and come and help him?

A. That don't disorganize it. If they are putting in rails or something at the present time and they can't come, then Mr. Blair waited until they could come and help him.

Q. Why is it you testified then, "He has to get in touch with us when he has extra work to be done or heavy stuff"?

A. I said when those men were not out there on the platform.

Q. You say lots of times Fanno was not available and you helped?

A. Yes, sir.

Q. Don't you know Mr. Fanno had never helped before?

A. May not have helped on heavy pipe but he has helped on machinery for I have been out there with him.

Mr. Hoffman:
That's all.

Redirect Examination

Mr. Casey:

Q. How many employees, truckers, or freight handlers were there in the freight house on June 26, 1939?

A. One, Mr. Blair.

Q. Do you now move large pieces of seamless pipe at the freight station?

A. Yes, sir.

Mr. Hoffman:

Objected to as to what happens now.

Objection sustained.

Mr. Casey:

Q. Are you able to state, Mr. Forsythe, the dimensions of the six-wheeled truck which you testified was present on June 26, 1939, how large it is?

A. I would say around about 18 or 20 inches wide and about three feet long.

Q. 18 to 20 inches wide and about 3 feet long, is that right?

A. Yes, sir.

Q. There are six small wheels on that?

A. Yes, sir. The two in the center are a little larger, just about an eighth of an inch larger than the other four, that is the two on each end, that is so it will move easily.

Q. So that you put an object on there and shove it where you want it to go?

A. That is so. You can steer it where you want to place it in the warehouse, that is why that is arranged that way.

Q. You say that was in the warehouse on the day of this accident?

A. Yes, sir, it was.

Recross Examination

Mr. Hoffman:

Q. You have been present many times when Mr. Blair came and asked for assistance in moving something?

A. Yes, sir, and plenty of times I went out and helped him.

Q. You only had one man in the warehouse at that time?

A. Yes, sir.

Q. Was that usual or unusual?

A. Usual.

Q. Just one man there to handle freight?

A. Yes, sir, one man at that time. Prior to that I did the work myself in the warehouse in addition to the clerical work in the office. I done it since 193— the early part of 1933.

Q. Did you have another man working at that time in the warehouse?

A. No, sir, I handled the freight myself.

Q. How do you know Mr. Blair didn't come to Mr. Kimes the day of this accident and ask for help?

A. Mr. Kimes' desk is right alongside of mine and I would have heard him if he came in the office.

Q. You don't have any particular recollection of this day because you didn't hear of the accident until the 3rd of July?

A. I know he didn't come in and ask at that particular time.

Q. How do you know that particular day aside from any other day?

A. Any other time he came in I went out and got the men or would see that they were out there.

Q. Every other time you went out and got the men?

A. When he came in and told us. Mind, you are asking when he came in and asked us for help.

Q. Every other time you got the men?

A. That's when he came in and asked for it. This particular time he didn't.

Q. So he didn't have the right to get men himself?

A. If they were not available outside. If they were around, why should he come in and ask us?

Q. Why? Because he is not a foreman and had no right to call them from their jobs?

A. He was told to ask for their assistance.

Q. He was told by you or Mr. Kimes?

A. Yes.

Q. Each time he was told?

A. No.

Redirect Examination

Mr. Casey:

Q. Where would you go to get the men?

A. I would go down to Mr. Miller's shanty if they were down there, or get the operator at QN Tower to find out where Mr. Fanno was.

Q. Will you tell us Mr. Blair's duty on or about June 26, 1939?

A. His duties were, in the morning, the first thing, to get the seal record of the car and then enter the record in the seal record book.

Q. What is the seal?

A. The seal records of the car, that is, see, the door of the car is sealed and he gets those records of the seals on there with the initial and number, take that record and write it in the seal record book.

Q. Then what does he do?

A. Then he starts to unload the merchandise.

Q. Did he have any other clerical work to do?

A. Yes. We asked him to come in the office and make up O. S. & D. reports, that is Over, Short

& Damage reports, and also enter the car loads in the 099 car record book and set up waybills and freight bills.

Q. So that he had clerical work to do?

A. There wasn't enough work in the warehouse to keep him busy all the time. When there was outbound freight he handled it and checked it into the car. After he would unload the merchandise he also checked.

Q. Against what?

A. Against waybills, to see that he had a sufficient number of pieces that the waybills called for.

Q. Did he do this office work continuously during the course of his employment from December, 1935, up till July 3, 1939?

A. At times he did. Sometimes when we asked him to do it, Mr. Kimes asked him several times to do this office work and he said that wasn't his part of the work, that he was a trucker, he wasn't a clerk in the office.

Q. Did he do clerical work?

A. Some clerical work.

Mr. Casey:

That's all.

Recross Examination

Mr. Hoffman:

Q. On Saturday afternoons when there was nothing else to do, you would have him scrub the driveway down to the passenger station and wash windows, wouldn't you?

A. He cleaned windows and shades at the warehouse.

Q. That wasn't his work, was it?

A. It was work assigned to that man when he was put on, see, when they put on an additional man—or put this man on.

Q. Wait a minute. What do you mean additional man?

A. On at the freight house. See, I was doing the freight house work myself out in the warehouse. The office work was piling up. We made a request for a man in the freight house. When they put him on they said he would have that to take care of, clean the windows and shades in addition to trucking and any other work assigned to him.

Q. In addition to trucker he was janitor?

A. He did some of that work; he was not the janitor.

Q. Not only at the freight house but the passenger station?

A. It may be we sent him up there. At that time janitor wages was less than trucker's wages. We had no janitor.

Q. He could have gone home Saturday afternoon but instead he stayed and did that work?

A. Some Saturdays he went home right after lunch, some he stayed until three o'clock and some he stayed until five o'clock.

Mr. Hoffman:

That's all.

Here Court adjourned until tomorrow morning at 9:30 a. m.

Wednesday, December 2, 1942

Met pursuant to adjournment and the taking of testimony continues.

H. B. CARTER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Mr. Casey:

Q. Your full name, please?

A. H. B. Carter.

Q. Where do you reside?

A. Now at Rochester, New York.

Q. What is your occupation?

A. Claim agent, Baltimore & Ohio Railroad.

Q. Were you claim agent on or about the 19th of July, 1939?

A. I was.

Q. Did you make an investigation of the accident to Clarence W. Blair of Ellwood City?

A. I did.

Q. Did you interview the plaintiff, Clarence W. Blair?

A. I did.

Q. Where?

A. At Ellwood City.

Q. Did you take a statement from him?

A. I did.

Q. I show you defendant's Exhibit "A" and ask you: hat is the statement you took from Mr. Blair?

A. Yes, sir.

Q. Did he sign it?

A. He did.

Q. Did Mr. Blair tell you on the occasion that you took the statement that, "The bed of the auto truck was a little higher than the freight house platform and the pipe laying on the nose truck was a little higher than the auto truck bed. As we reached

the auto truck Fanno was at the front end of the pipe while Mr. Miller and I were at each side of the pipe practically opposite each other back at the handle of the nose truck. If I remember correctly I had hold of the one handle of the nose truck with my right hand. We continued to shove ahead with pipe on the nose truck until the toe plate of nose truck struck against the rear end of auto truck and when this occurred the pipe slid forward from the nose truck to the auto truck"?

A. Yes, sir.

Q. Did Mr. Miller tell you in that statement, "We—"

The Court:

Mr. Blair, you mean, don't you?

Mr. Casey:

Q. Or Mr. Blair, beg pardon. "We handled all three of them in the same manner which is the usual and customary manner to handle shipments of this kind and the same as I had handled many previous shipments of pipe", did he tell you that?

A. Yes, sir.

Mr. Casey:

Cross examine.

Cross Examination

Mr. Hoffman:

Q. Where were you located, Mr. Carter, when you took this statement?

A. In what capacity, sir?

Q. Where were your headquarters?

A. In Pittsburgh.

Q. Pittsburgh?

A. Yes, sir.

Q. You went up to Ellwood City on the 19th of July, did you, to get this statement from Mr. Blair?

A. That is correct.

Q. And how long have you been working as claim agent for the B. & O. Railroad?

A. As claim agent since 1933.

Q. Before that what did you do?

A. Well, I was from there down to stenographer.

Q. How long have you been with the B. & O.?

A. Eighteen years.

Q. Were you a stenographer in the Claim Department?

A. Yes, sir.

Q. And you are familiar with taking statements from injured employees and other persons, are you?

A. That's correct.

Q. And you wrote this yourself on the typewriter, is that right?

A. Yes, sir, that's right.

Q. And you wrote it in your own words, not in Mr. Blair's words?

A. Well, I wouldn't say that.

Q. You wouldn't say that?

A. No.

Q. Well, this isn't a verbatim statement of the answers that Mr. Blair gave to your questions, is it?

A. In substance, yes, sir.

Q. In substance, yes. You don't have down here the questions you asked him and the answers that he responded?

A. No, sir.

Q. Did you pick out of his telling the parts that you liked best to put in here?

A. Oh, no, sir.

Q. You didn't? Is that everything he said to you?

A. That's his account of the accident as he gave it to me.

Q. He told you he was employed at a salary of 52-3/10 cents an hour, did he?

A. If that's what is on the statement, that's correct.

Q. That's in here. He told you, did he, that he didn't recall the points of origin or destinations of all the shipments he had handled from that box car that morning, is that right?

A. Yes, sir.

Q. You apparently didn't ask him where this particular pipe came from or where it was going, did you?

A. I believe I did.

Q. Show me in there where that is?

A. Here (indicating) it is, sir.

Q. Just read it; what does it say?

A. "I did not notice where the shipment was from", referring to the three pieces of pipe for the National Tube Company at Ellwood City.

Q. He told you on July 19th, the date of that?

A. Yes.

Q. He told you he didn't know where that pipe was coming from?

A. Exactly.

Mr. Hoffman:
That's all.

Mr. Casey:

If your Honor please, I don't recall whether plaintiff's Exhibit No. 1 was offered in evidence. In case it wasn't I hereby offer it.

Mr. Hoffman:

It was offered.

Mr. Casey:

I also offer in evidence defendant's Exhibit "A", being the statement.

The Court:

We will reject it as a whole. You can introduce the material parts of it. There were only a few items in which contradiction appeared, weren't there?

Mr. Casey:

That's right and I put those in this morning.

Mr. Hoffman:

I think I am prejudiced to that portion then that you ruled out. It had been read to the jury.

The Court:

I will instruct the jury to disregard it.

Mr. Hoffman:

The man read the whole thing. They already have it in their minds. They got something from what counsel read and your Honor struck out.

The Court:

Mr. Casey, you can admit the material parts of that where you questioned him as to contradictions and he denied them.

Mr. Casey:

Well, the statement is taken in narrative form.

The Court:

As I have it, you questioned him on several

items. The only particulars in which he denied the statement are that he denied telling Carter he used an automobile jack to raise the end of the tube; he denied telling Carter those particulars as to the height of the big truck and height of the little truck; he denied the statement to Carter as to his using his fellow employees. Now you can introduce such portions of the statement as indicate he did say those things.

Mr. Casey:

If your Honor please, I offer in evidence the portion of the statement of Clarence W. Blair as given to H. B. Carter, defendant's claim agent, on the 19th of July, 1939, "We raised one end of the pipe with an automobile jack and shoved the two-wheel nose truck back under the pipe to a point where the pipe would balance on the toe plate and crossbar between the handles of the truck." I offer in evidence that portion of the plaintiff's statement. "The bed of auto truck was a little higher than the freight house platform floor. The pipe laying on the nose was a little higher than the auto truck bed. As we reached the auto truck Fanno was at the front end of the pipe while Miller and I were at each side of the pipe practically opposite each other, back at the handle of the nose truck. If I remember correctly I had hold of one handle of the nose truck with my right hand. We continued to shove ahead with pipe on nose truck until toe plate of nose truck struck against rear end of auto truck and when this occurred the pipe slid forward from the nose truck to the auto truck."

I offer in evidence that portion of the statement, "After this occurred we proceeded to load the third one on to truck. We handled all three of them in the same manner which is usual and customary manner to handle shipments of this kind and same as I had handled many previous shipments of pipe. My injury was not caused by any act or omission on the part of either of the men helping me."

Mr. Casey:

The defendant rests, if your Honor please.

Mr. Hoffman:

No rebuttal, your Honor.

Mr. Casey closes to the jury for the defense.

Mr. Hoffman closes to the jury for the plaintiff.

IV.

ORAL CHARGE OF THE COURT

O'Toole, J.
Rahn, Reporter

Members of the Jury:

This being your first case it may be that I shall find it necessary to talk to you a little longer than I ordinarily would, because it is very important that you understand the underlying principles of this case in particular, and generally that you understand your functions as jurors. I shall try to outline both considerations to you and not take any more time than is necessary in doing it.

This action, as you have learned, is brought by Mr. Clarence Blair against the Baltimore & Ohio Railroad Company to recover for injuries which Mr. Blair received in June, 1939, while he was engaged at his employment for the B. & O. Railroad Company at its freight warehouse in Ellwood City, Lawrence County, Pa. Some of the facts are not in dispute.

It appears that on that morning it was Mr. Blair's job to unload a carload of freight which had come into Ellwood City, and after he had removed most of the merchandise from the freight car he found at the bottom of the car the three pipes which you have heard described; they were seamless steel tubes about thirty feet long, about ten inches in diameter, and the three of them together weighing approximately thirty-one hundred pounds. They

were consigned to the National Tube Company in Ellwood City. It was his job to remove them from the freight car and place them either in the warehouse or on the truck of the National Tube Company which was to come and pick them ap. When he and others who had been assigned to help him, or whom he had invited to help him, as a fact, maybe, were moving these pipes, one of the pipes fell off or slid off the nose truck, fell off or slid off the nose truck, which they were using to move it from the freight car to the truck of the National Tube Company, causing the nose truck to turn over, or shoot back, or move with some suddenness in some direction so that the leg of the nose truck in turning about struck Mr. Blair with some violence right below the rib line on the ieft front side of his body. In that accident he received certain injuries, the nature of some of which are admitted and the nature of some of which are disputed and about which I will talk to you a little later.

There is disagreement among the witnesses on both sides as to how the accident actually did happen. Mr. Blair said before he undertook to move these pipes he went to his superiors, the freight agent and the chief clerk, and told them what he was up against and suggested the pipe be sent in the car to the ultimate destination, but was told by his superiors that the pipe should be unloaded at the warehouse where the car was then spotted and was told to secure the services of two men who worked at or about the warehouse, one of them Mr. Fanno and one Mr. Miller. Mr. Blair said he further protested that even three men would not be able to move the pipe but was told by his superior it was either or; if he

did not do it he would get somebody else that would. Pursuant to that order he got Mr. Fanno and Mr. Miller to help move the pipe. The equipment was described by Mr. Blair and with greater particularity by Mr. Forsythe. They had two nose trucks, two dollies, one a six-wheeled dolly and one a one-wheeled dolly; they had several inch bars; they had a barrel of rollers; and they had a hydraulic jack, sometimes referred to in the testimony as an automobile jack. Mr. Blair said they undertook to move the pipe by getting the nose of the nose truck under it and then lifting it and then blocking it up or getting it up in some manner to get it to the center of the nose truck and then balance the nose truck by the two handles, then by getting the truck where the handles were close to the floor, the nose apparently being up, they were able to keep the pipe in somewhat of a condition of balance on the nose truck and thus push it forward to where they were going to unload it. They proceeded all right with the first pipe. By the way, these pipes were apparently greased and slippery. When they undertook to move the second pipe, the pipe slid off and the two men were apparently unable to hold it. Mr. Blair made an effort to hold his handle, apparently thinking it would kick back. The nose truck did kick back and caused the leg of the truck to hit him.

He is the only one who testifies the pipe fell off the nose truck at the place and in the manner I have just described. The other witnesses say that they had got the pipe just about on to the automobile truck of the National Tube Company and that there because of some bump or some sudden movement of the nose truck, the pipe started to slip forward. Mr.

Miller said it was at a time when the wheels of the nose truck were about ten feet from the automobile truck and that when the pipe started to slip forward into the automobile truck he, Miller, realizing it was too heavy for them to handle and knowing if he tried to hold on to it he would be hurt, stepped aside and the truck shot back and hit Mr. Blair.

Mr. Fanno gives another explanation and it appears to me it is a reasonable one, although it is for you to decide, not for me. He said they got it right up to the automobile truck and then he says, "We gave it a push." The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair. Mr. Fanno said that is what happened. Whether that happened or the other thing happened, of course, is your question and not mine.

Now, I must explain something by telling you that this is not what we know in Pennsylvania as a Workmen's Compensation case. I have no doubt that some of you, either in your own experience or because of the experience of members of your family, or experience of men who work with you either in your office or shop or elsewhere, are somewhat familiar with our Pennsylvania Workmen's Compensation Law, and you may know that under our law in Pennsylvania, if a man is hurt at his work he is entitled to recover compensation according to a fixed sched-

ule, no matter whose fault it was when he was hurt. I do not want you to take that notion into the jury room with you. This case is not brought under our Workmen's Compensation Law; it is brought under an Act of Congress and that Act of Congress and not our Workmen's Compensation Law fixes the rights of the parties to this case. Whereas under our law of Pennsylvania it is not necessary to prove a workman was hurt through the fault of his employer, he is entitled to recover no matter whose fault it was in most cases, under the Act of Congress, which law controls you and me in this case, before an injured workman can recover he must prove that his injuries were caused by the negligence of his employer.

Now, negligence is not hard to understand; it is simply carelessness. It is sometimes defined as the failure to use proper care in the circumstances. It is the doing of something which an ordinary prudent man would not have done in the circumstances, or it is the failure to do something which an ordinary prudent man would have done in the circumstances.

As we apply the law to the Railroad Company in its relation to its employees, there is an obligation on the Railroad Company to use reasonable care for the safety of its employees, and as a particular under that general proposition there is an obligation on the part of the Railroad Company to use reasonable care in providing its employees with reasonably safe equipment for the purposes to which that equipment is about to be put in the performance of the duty of the employee. The Railroad Company naturally does not insure the safety of the employee, nor does it insure the safety of the equipment it gives him. The Railroad Company is

not required to supply an employee with the safest equipment that can be obtained, nor is it required to supply him with the latest and most modern design and make there is; it is fulfilling its duty if the equipment it gives him is reasonably safe for the purpose intended and which could not be reasonably expected to cause injury when handled with prudence and with the employee himself exercising ordinary care.

Likewise, it is an obligation of the Railroad Company to supply an employee with sufficient help; I mean by that with reasonably sufficient man-power to do the job at hand. They are not required to recruit a crew of athletes who are in the perfection of physicial condition. They are not required to bring in men who are physical giants. All they are required to do is to supply men with sufficient skill and experience and sufficient ability that the ordinary prudent person would expect them to be able to do the work assigned to them with safety to themselves and other employees engaged in the job.

In this case the plaintiff alleges that the Railroad Company failed in both of those duties. In the first place, that the equipment provided to him for the work that he had to do was not reasonably safe, that it was, in fact, dangerous and that the inadequacy of the equipment, the nose truck, which he was compelled to use, according to him, was the proximate cause of the injuries he sustained. He likewise says that the men provided were not of sufficient physical ability and experience to permit him and them to perform this job with reasonable safety to himself. Those are both questions of fact which you have to decide.

You have heard the equipment described, you have heard the nature of the work outlined, and you have to decide whether or not that equipment was such as a reasonably prudent employer would have provided to his workmen to do the job that they had to do. Likewise, you have seen both Mr. Fanno and Mr. Miller here and as you measure them on the witness stand, realizing their physical proportions as you saw them, their ages as they described to you, the nature of the work which they customarily did, you have to decide whether or not a reasonably prudent employer was fulfilling his duty as a reasonably prudent man would see it in sending these two men and no more to assist Mr. Blair in doing the work his employer insisted they should do.

There is a third ground of negligence pleaded and perhaps supported in some way by the testimony although it is for you: That is, the Railroad must answer if its employees in their negligence caused injury to another employee, and, under the testimony in this case, if it is believed, there is some testimony to this effect, that Fanno and Miller in doing the work did not themselves use reasonable care to do it in a proper manner. I have particular reference to the testimony of Mr. Fanno, that "we gave it a push." Was that the conduct of a reasonably prudent man? Should he, in the exercise of due care, have anticipated that if he gave it a push as he said he gave it a push, the pipe would fall to the ground just as it did fall, and that the nose truck would shoot back, in the manner it did shoot back with the injuries it caused to Mr. Blair. That is a question of fact for you, and if you find that Mr

Fanno and Mr. Miller did not use reasonable care and their failure to use reasonable care was the direct and proximate cause of the injuries which Mr. Blair sustained, then you have a right to find that the Railroad must answer for the negligence of its employees which caused these injuries, if there was such negligence on the part of the employees and if such negligence was the cause of Mr. Blair's injuries.

Under our Pennsylvania law, and you will hear quite a bit about this, a person cannot recover because of the negligence of another if he, himself, was negligent and if his negligence contributed in any way to the injuries which he sustained. That is not the law of this case because—and again I must tell you—this case is governed not by our Pennsylvania law but by an Act of Congress, and the Act of Congress says that an employee's right to recover shall not be defeated by his own negligence. However, if the employee in this case, Mr. Blair, himself, was careless or negligent and his own carelessness or negligence contributed to cause the misfortune he suffered, then you must reduce any amount you would give him in such sum as would be proportionate to his negligence as compared with the company's negligence. You see, if you should find that the company was negligent, as I have defined negligence to you, and at the same time find Blair, himself, was careless, then you must decide how much Blair's carelessness contributed to the injury as compared to the company's carelessness contributing to the injury, and reduce any amount you would give Blair in the proportion

which would represent the comparative negligence of Blair to the negligence of the company.

Likewise, it is the law that the employee cannot recover if the accident which causes the injury he sustains is an ordinary risk of the business which he must have assumed when he takes and keeps the employment. Was this accident on June 26, 1939, an ordinary risk which was naturally incident to the business or work that Mr. Blair was engaged in. If if was, then it must be taken he assumed that risk when he took and kept the job and he can not recover. However, if the accident was something unusual, out of the ordinary, and not such a risk as he is taken to have assumed when he took the work, then, of course, he could recover providing the Railroad Company or its employees were negligent. That rule of law, that an employee cannot recover if he assumed the risk may be said to be modified somewhat in this respect; that an employee is not required in all cases to insist arbitrarily on his judgment as against the judgment of his superior. In other words, if a superior assures him that a particular piece of work is safe and orders him to proceed and do it, then you have a right to consider whether or not the employee was justified in subordinating his judgment to the more mature judgment of the superior who assured him the thing was safe. Of course, if the thing to be done was so obviously dangerous that the employee at all times, in spite of what his superior was saying, knew it was dangerous, then he has no right to abandon his own judgment and take the judgment of a man he did not believe. That is a question for you. Again, I repeat, if the accident was a natural risk incident

to the business on which the employee was engaged and no more than that, then, of course, he cannot recover.

If you get past both of those questions and decide that the company or its employees were negligent and that negligence was the proximate cause of Mr. Blair's injury and, second, if you decide that the accident was not an ordinary risk such as Mr. Blair assumed, and only if you get past those two questions, you come to the question of damages, and that is: what is Mr. Blair entitled to at your hands?

First he would be entitled to recover, if he is entitled to recover at all, for his loss of wages to date, but only for such loss as was due to this injury. You will remember his testimony as to what his wages were and what he has been able to earn since. However, you are not bound by the figure he gave you. He said he was formerly earning $100 a month. That would be the maximum you would allow him. In no event should you allow him more than you believe he lost by reason of the injuries he sustained and physical disability resulting from those injuries, if any.

He likewise is entitled to recover, if he has proved he has suffered it, the loss for the impairment of his earning power. In other words, if, because of the injuries he sustained, he has been deprived of his ability to earn in the future, then he is entitled to be compensated for that loss of his ability to earn. That is a matter difficult for you to compute, if you get to the place where you wish to compute it. In the first place, you must consider the prob-

ability in time of his earning power. I mean by that, how long would he have been able to continue to earn if he had not been injured? There are some people who live to a great age, but none of us can guarantee that we will be able to work tomorrow. Life is very uncertain and we often see a person who appears to be and actually is in the very flower of health snuffed out like a candle and gone tomorrow. So you take into consideration the very uncertainty of the length of human life when you come to calculate what loss of future earnings Mr. Blair has. You consider what you have heard as to his habits of work before the injury, his condition of health before the injury, his health record before the injury, and the testimony as to that is he suffered a knife wound at or about the same place as he suffered this wound, he had influenza in 1918, or approximately that year, he had all the childhood diseases which, of course, are not generally so important, but among those he had was diptheria, and he testifies that for headaches and stomach complaints he visited the doctor, I think he said, not more than once a year. Generally you have to recall all the testimony that is in this case as to Mr. Blair's physical condition before the accident and have that in mind when you undertake to determine what his life expectancy would have been if he had not been hurt. Likewise, you have to consider the nature of the work he was doing, whether it was hazardous work, and he would therefore have his useful life shortened or whether it was safe work in which a man could have worked as long as he kept his health and his faculties. You must also consider that the length of a man's life does not regulate the

length of time he would be able to work, especially in the work Mr. Blair was doing. His physical powers might wear out before the end of his days and he might not be employable nearly as long as the time he lives. Consider all those things and form your best judgment as to what would be the probability of the length of time he could have been gainfully employed if he were not hurt, and then find out if there was any loss of earning power and find out what, if anything, was his total loss on that account.

If you should decide to award Mr. Blair anything because of loss of future earning power, you must realize you are compensating him for some sum he would not ordinarily receive today, he would only receive it at some distant time in the future, and if I have money today in my hands that money is more valuable to me than the same sum of money I would receive at some time in the future. So you must reduce any amount you should decide to give him by such sum as represents the difference between the present and future value of the money. I need to take only one example to show you what I mean. If you or I pay the United States Treasury Department $18.75 today, ten years from today they will give us back not $18.75, they will give us back $25.00. The difference between the $18.75 we pay and the $25.00 we get back represents what it is worth to the Treasury Department to have that money now rather than ten years from now, and it represents the difference between the present and future value of the money. Now, I recite that instance only as an example, not as a standard. You are not bound by that example or the figures given in

it, because the length of time which you figure he may be able to earn might or might not be more or less than the ten years I have given in the Treasury figure and the value you fix on money might be more or less than the figure used by the Treasury Department. I only use that as an example, not as a standard to bind you in any way.

There is a real dispute in this case as to what injuries Mr. Blair did suffer by reason of this accident. We can divide his disabilities generally into two classes: First, there is not much dispute, if any, that at the time of the accident he suffered an injury to the cartilage or rib structure of his chest. If there is any disability remaining from that injury to the rib structure or to the cartilage, he is entitled to recover for it because it is traced directly to the accident and the connection between it and the accident is not denied. On the other hand, he complains of a disability which did not develop at the time of the accident but, according to him, resulted from the accident although it developed later and that is the more serious of his disabilities. It is admitted by both sides that he still suffers somewhat from it but it is disputed, and it is a question which you will have to decide, whether that second disability resulted from the accident. I refer, of course, to the condition which he now has due to the bronchial ailment he suffers and which has become chronic and, according to both doctors, permanent. He connects it with the accident and has a doctor to support his opinion in this: He says because of the accident it was necessary for him to go to the hospital for an operation and to be confined in the hospital for a consider-

able time. By reason of the operation and confinement he was reduced to a weakened physical condition, and because of the weakened physical condition he was subject to colds and did contract a serious cold and that serious cold resulted in the bronchial condition which is permanent and permanantly disables him. He had a doctor who supports him in that claim, Dr. Decker. On the other hand, the doctor who operated on him expresses his opinion that there is no connection whatever between the bronchial condition and bronchial disability and the accident. He said at the time Mr. Blair came to the hospital to be operated on that Mr. Blair was already suffering from the bronchial condition and it was at that time chronic and he told you the facts on which he bases his opinion.

If the bronchial condition which Mr. Blair has now has no connection with the accident, Mr. Blair is not entitled to recover for it from the B. & O. Railroad. Before you should award him any compensation because of this bronchial condition as distinguished from the injury to the cartilage and rib, you must be satisfied by a fair preponderance of the testimony that there was actual connection between the accident and injury and present bronchial disability. The burden is upon Mr. Blair to establish that. In other words, if you are unable to say "Yes" or "No" this bronchial condition is or is not due to the injury, then you must decide against Mr. Blair because it is Mr. Blair's duty to establish to you that there was a connection between the accident and his present bronchitis and lung disability Not only as to the injury but as to all the

facts on which Mr. Blair must rely in order to recover is the burden of proof on him.

Negligence—and only negligence can make this Railroad responsible—is not to be presumed from the mere fact that an accident happened; it must appear affirmatively in the evidence. The burden is on Mr. Blair to prove it. He meets that burden when he satisfies you by the fair preponderance of the testimony that it is true. I mean by that if the volume and quality of the evidence on his side in favor of the proposition is heavier than on the other side against the proposition, then he has met the burden. If, however, after hearing all the testimony introduced by him and by others, it leaves your mind in such a condition that you cannot say with some satisfaction to yourself, "Yes" or "No", then it cannot be said the plaintiff has met the burden of proof in the volume and quality of the evidence.

When you have contradiction, such as in this case, it is up to you to weigh all the testimony and try, as well as you are able, to sift out the truth and in doing that you do it very much in the same way as you do outside in your daily affairs when someone comes to you and tells you such and such is so. You apply to them and their story certain standards, and you make up your mind whether the story is true or false. You do the same here. You consider first whether any witness has any interest here. I think it is fair for me to say Mr. Blair has an immediate financial interest in your verdict. You have to decide whether that interest would induce him to color his testimony one way or the other.

All the other witnesses except the doctors are employees of the B. & O. Railroad. You have a right to consider whether their loyalty to the company or any other interest they may have would be such as to cause them to color their testimony one way or the other. Mr. Main has no interest in the case. Likewise you should consider the manner and appearance of each witness who appeared on the witness stand. What was their demeanor? Did they appear willing and anxious to tell the truth or willing and anxious to color their testimony or not tell the truth? Likewise, you have to consider the reasonableness of the story itself. Is it a story which is easy to believe or a story that is just a little bit hard to swallow? Which witness is telling the truth and which isn't is a question for you and not for me.

You are not to take from anything I have said to you either in discussing the law or in discussing the evidence that I have any opinion one way or the other on any question of fact submitted to you. You are the sole judges of the facts. You are to be controlled by your judgment on the facts and not by mine. For that reason I do not express any opinion on any question of fact. Likewise, if I, or either of the lawyers, misquoted any part of the testimony you rely not on our recollection but on your own recollection.

The fact that I have referred to some parts of the testimony and to my notes of those parts of the testimony is not taken by you that they are the only important parts of the testimony because the weight to be given all the testimony is for you and not for me.

The Court (to counsel):

Gentlemen, anything in this charge that is inadequate or not covered, I will be glad to take your suggestions and make corrections or additions.

Mr. Hoffman:

I have nothing.

Mr. Casey:

I ask that the jury be instructed if they believe any witness falsified his testimony in any material part that they have a right to disregard all his testimony.

The Court (to the jury):

That is the law with this addition: If you find that any witness has testified falsely, you have a perfect right in your discretion to reject all of the testimony of that witness, or you have a perfect right in your discretion to reject part of the testimony of that witness and retain and consider a part; in other words, you have a right to reject such part of the testimony as you believe to be false and retain and consider such part of the testimony as you believe to be true.

Mr. Casey:

I ask that the jury be instructed on the fact that they have a right to consider that Blair was a mature man, experienced in his job; also the fact that several trips were made with the same appliance.

The Court (to the jury):

To show you the connection of the suggestion and the law, I want to repeat what I undertook to say

to you about assumption of risk. The employee assumes as a risk of his employment such dangers as are normally incident to his occupation and a workman of mature years, such as Mr. Blair undoubtedly was, is taken to have assumed them whether he is aware of their existence or not. That is the law.

The Court: (to counsel):

Anything else?

(No response)

The Court (to the jury):

One of the parties has requested me to instruct you specially, which request is refused and not read.

Very well, members of the jury, take the case.

Mr. Casey:

If your Honor please, I desire to have a general exception to the charge; an exception to the charge on reasonable care; an exception to the charge as to appliances and help; an exception to the charge as respects his fellow workmen; and exception to the charge as to assumption of risk.

Exceptions noted.

Mr. Hoffman:

May I have a general exception and special exception to that last statement that he assumes them, whether he is aware or not.

Exceptions noted.

POINT FOR BINDING INSTRUCTIONS

requested

The Court is respectfully to charge as follows:

1. Upon all the evidence, the verdict must be for the defendant.

Refused and not read. Exception. O'Toole, J.

(s) Margiotti, Pugliese & Casey,
Vincent M. Casey,
Attorneys for Defendant.

V.

MOTION FOR JUDGMENT N. O. V. IN FAVOR OF THE DEFENDANT, THE BALTIMORE AND OHIO RAILROAD COMPANY

Now, to wit, December 3, A. D., 1942, comes the defendant, in the above entitled case, Baltimore & Ohio Railroad Company by their attorneys, Vincent M. Casey, Margiotti, Pugliese & Casey, and moves the Court to have all the evidence taken upon the trial of the above entitled case duly certified and filed so as to become part of the record and for judgment in favor of the defendant non obstante veredicto upon the whole record, a point for binding instructions in favor of the defendant having been submitted to the Court and declined.

Vincent M. Casey,
Margiotti, Pugliese & Casey,
Attorneys for Defendant.

ORDER OF COURT

Now, to wit, December 3, A. D., 1942, the foregoing motion having been presented in open court and upon consideration thereof, it is ordered and directed that the motion be filed and that all the evidence taken upon the trial be duly certified and filed so as to become part of the record in the case, and rule is hereby entered upon the plaintiff to show cause why judgment should not be entered in favor of the defendant non obstante veredicto upon the whole record returnable sec. reg.

By the Court,
SMS.

VI.

MOTION FOR NEW TRIAL.

And now, to wit, December 3, A. D., 1942, comes the defendant in the above-entitled case, Baltimore & Ohio Railroad Company, a corporation, by Vincent M. Casey, Margiotti, Pugliese & Casey, his attorneys, and moves the Court to grant a new trial in the above-entitled case for the following reasons:

1. The verdict is against the law.

2. The verdict is against the evidence.

3. The verdict is against the weight of the evidence.

4. The verdict is against the charge of the Court.

5. The Learned Trial Court erred in refusing defendant's point for binding instructions.

6. The Learned Trial Court erred in the admission of testimony on the part of the plaintiff.

7. The Learned Trial Court erred in the rejection of testimony on the part of the defendant.

8. The defendant asks leave to file additional reasons for new trial within twenty (20) days after the testimony and charge of the court are transcribed and filed.

VINCENT M. CASEY,
MARGIOTTI, PUGLIESE & CASEY,
Attorneys for Defendant.

VII.
OPINION

Before Kennedy, Marshall and O'Toole, JJ.

O'Toole, J.

The plaintiff, formerly employed as a trucker in the freight house of the defendant at Ellwood City, Pennsylvania, brings this action under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 51, to recover for personal injuries suffered in the course of his employment. He, with two others, was attempting to move a heavy steel tube on a small hand truck when the tube got out of control, causing one handle of the hand truck to strike the plaintiff in the side just below the rib line, doing serious damage to the cartilage and muscle structure of the chest. Plaintiff is now permanently and totally disabled, with a bronchiectasis, which he alleges resulted from his injuries. The jury returned a verdict in favor of the plaintiff for $12,000.00, and defendant now presents a motion for a new trial and a motion for judgment n. o. v.

The three participants in the action gave three different descriptions of the accident, that of the witness Fanno, being sufficient, if believed by the jury, to sustain a verdict for the plaintiff.

The tube was 30 feet long, 10 inches in diameter, and weighed 1,033 pounds. It was greased and slippery. The three men balanced the tube on a two-wheel nose truck, with the handles of the truck (on

the end opposite the nose and the wheels) so lowered that the truck and the pipe resting on it were almost horizontal. The greasy pipe rested on the nose of the truck and on a cross member close to the handles, both of which were steel. Fanno then describes the action,

> "Why, we went and get that pipe on the truck. We put him on the truck and come back to get the other one. When we get the other one and we was near the truck we give a push and when we give a push the little truck went against the big truck and the pipe went on the truck and truck kicked back and hit Mr. Blair in here (indicating)": (page 153);
>
> "When we give shove the pipe, the car went and heavy weight of the pipe when hit against the Tube Mill truck, why, the car kicked, went way out and hit him here (indicating)": (page 154);
>
> "The pipe was on the truck, on the Tube Mill truck, but you see before we get to that we give him push and pipe go right in all the way on the truck, and when little truck hit big truck why the truck kicked": (page 157).

The jury had a right to find on the questions submitted to them, that the handling of the pipe was negligent. Considering the size and weight of the greasy pipe, balanced precariously on the light truck, any person of reasonable prudence could have anticipated that pushing the little truck against the big truck with enough violence to cause the pipe to slide forward, might cause the litle truck to shoot back and hurt someone.

It is true that the plaintiff may have participated in this negligence, but under the Federal Employers' Liability Act contributory negligence does not bar recovery. It only reduces the award in the same proportion as the negligence of the plaintiff contributed to the result. The Federal Employers' Liability Act provides that there can be recovery if the negligence of fellow servants "contributed in whole or in part" to cause the injury.

Nor can the plaintiff be said as a matter of law to have assumed the risk of negligence of his fellow servants. In any situation the burden of proving the assumption of risk is on the defendant, unless the evidence indisputably shows such assumption. On the confused condition of the proof in this case the question was for the jury. Assumption of risk is not to be confused with mere contributory negligence. The former is contractual and arises, if at all, at the time of the employment. Accordingly the motion for judgment n. o. v. will be refused.

Plaintiff contended that the defendant was answerable for negligence in three particulars, viz., failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees as described above. The trial judge asked the jury to pass on all three particulars. This was error.

While there was sufficient testimony to support the third particular and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either. We can not now determine on

which particular the jury found the defendant had been negligent, and a new trial will be granted.

Because we considered the verdict in this case to be just and reasonable, we have deliberated a long time before ordering a new trial. In order that neither party may be further delayed, the case will be listed for trial immediately after the resumption of jury trials in September next.

ORDERS

And now, this 22nd of July, 1943, the motion for judgment non obstante veredicto is refused.

By the Court,
O'T.

Eo die, exception noted to defendant and bill of exception sealed.

O'Toole, Jr. (Seal)
Judge.

And now, this 22nd day of July, 1943, the motion for a new trial is granted, and it is further ordered and directed that the above stated case be listed for trial as soon as convenient after the resumption of jury trials in September, 1943.

By the Court,
O'T.

Eo die, exception noted to plaintiff and bill of exception sealed.

O'Toole, Jr. (Seal)
Judge.

VIII.

CERTIFICATE OF TRIAL JUDGE

This is to certify that the reasons set forth in my opinion ordering a new trial in the above entitled action, are the sole and only reasons that impelled and persuaded the granting of a new trial.

(s) JAMES L. O'TOOLE, JR.,
Trial Judge.

IX.

FINAL ORDER

And now, Jul. 22, 1943, the motion for judgment non obstante veredicto is refused.

By the Court,
O'T.

Eo die, exception noted to defendant and bill of exception sealed.

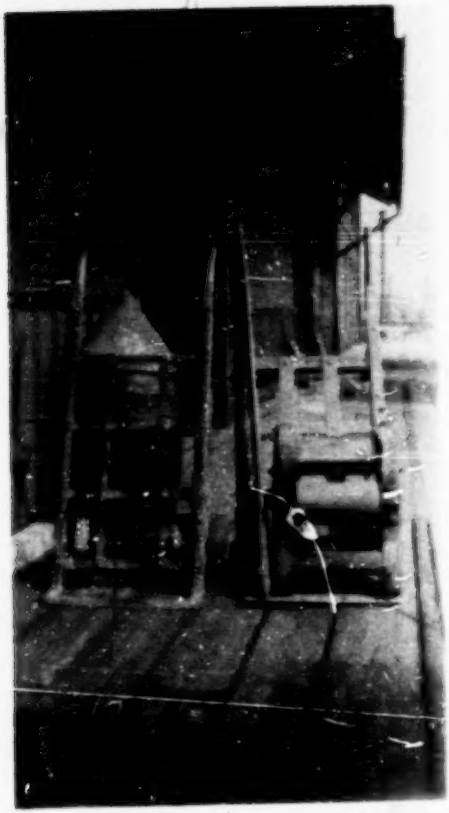
O'TOOLE, JR.,
Judge.

And now, Jul. 22, 1943, the motion for a new trial is granted, and it is further ordered and directed that the above stated case be listed for trial as soon as convenient after the resumption of jury trials in September, 1943.

By the Court,
O'T.

Eo die, exception noted to plaintiff and bill of exception sealed.

O'Toole, Jr.,
Judge.



[fol. 139a] DOCKET ENTRIES

March Term, 1944

No. 9

CLARENCE W. BLAIR

v.

BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, Appellant

Appeal from the order refusing judgment N.O.V. of the Court of Common Pleas of Allegheny County at No. 2677 July Term, 1941.

August 24, 1943, Appeal and affidavit filed and writ exit.

September 27, 1943, Appearance for appellee filed.

February 11, 1944, Assignments filed.

March 1, 1944, Record and Testimony filed at No. 53 March Term, 1944.

March 23, 1944, Argued 81.

DECISION—May 22, 1944

The order is reversed and judgment is here entered for defendant.

Linn, J.

June 2, 1944, Remitted.

June 19, 1944, Praecipe for certification of record filed.

June 19, 1944, Praecipe for Supplemental Certiorari filed and writ exit.

For Appellant: Margiotti, Publiese & Casey; Vincent M. Casey.

For Appellee: J. Thomas Hoffman; Randall B. Luke.

[fol. 140a] DOCKET ENTRIES

March Term, 1944

No. 53

CLARENCE W. BEAIE, Appellant,

v.

BALTIMORE AND OHIO RAILROAD COMPANY

Appeal from the order granting new trial of the Court of Common Pleas of Allegheny County at No. 2677 July Term, 1941.

October 11, 1943, Appeal and affidavit filed and writ exit.
October 28, 1943, Appearance for appellee filed.
March 1, 1944, Record and Testimony filed.
March 14, 1944, Assignments filed.
March 23, 1944, Argued 81.

DECISION—May 22, 1944

The order is reversed and judgment is here entered for defendant.

Linn, J.

June 2, 1944, Remitted.
June 19, 1944, Praecipe for certification of record filed.
June 19, 1944, Praecipe for Supplemental Certiorari filed and writ exit.

For Appellant: J. Thomas Hoffman; Randall B. Luke.

For Appellee: Margiotti, Pugliese & Casey; Vincent M. Casey.

[fol. 141a] III

ASSIGNMENTS OF ERROR

At No. 9 March Term, 1944

The Baltimore & Ohio Railroad Company, a corporation, appellant above-named, files the following assignments of error:

1. The learned Trial Judge erred in refusing defendant's point for binding instructions, the point, ruling of the court thereon and exception thereto being as follows (130a):

"The Court is respectfully (requested) to charge as follows:

1. Upon all the evidence, the verdict must be for the defendant.

Refused and not read. Exception. O'Toole, J.

(S.) Margiotti, Pugliese & Casey, Vincent M. Casey, Attorneys for Defendant."

2. The learned Court below erred in refusing defendant's motion for judgment non obstante veredicto, the point for binding instructions, motion for judgment n. o. v., Order of the Court thereon and exception thereto being as follows (130a, 137a):

"The Court is respectfully (requested) to charge as follows:

1. Upon all the evidence, the verdict must be for the defendant.

[fol. 142a] Refused and not read. Exception. O'Toole, J.

(S.) Margiotti, Pugliese & Casey, Vincent M. Casey, Attorneys for Defendant."

"Now, to wit, December 3, A. D., 1942, comes the defendant, in the above entitled case, Baltimore & Ohio Railroad Company by their attorneys, Vincent M. Casey, Margiotti, Pugliese & Casey, and moves the Court to have all the evidence taken upon the trial of the above entitled case duly certified and filed so as to become part of the record, and for judgment in favor of the defendant non obstante veredicto upon the whole record, a point for binding instructions in favor of the defendant having been submitted to the Court and declined.

Vincent M. Casey; Margiotti, Pugliese & Casey, Attorneys for Defendant."

"And now, Jul. 22, 1943, the motion for judgment non obstante veredicto is refused.

By the Court, O'T.

"Eo die, exception noted to defendant and bill of exception sealed.

O'Toole, Jr., Judge."

[fol. 143a] Assignment of Error

At No. 53 March Term, 1944

The learned Court erred in granting a new trial, which order is as follows:

Order

"And now, this 22nd day of July, 1943, the motion for a new trial is granted and it is further ordered and directed that the above stated case be listed for trial as soon as convenient after the resumption of jury trials in September, 1943.

By the Court, O'T.

Eo die, exception noted to Plaintiff and bill of exception sealed.

O'Toole, Jr., Judge. (Seal)"

(137a)

[fol. 144a] In the Supreme Court of Pennsylvania, Western District

No. 9. March Term, 1944

Clarence W. Blair

v.

Baltimore & Ohio Railroad Company, a Corporation, Appellant

No. 53. March Term, 1944

Clarence W. Blair, Appellant,

v.

Baltimore & Ohio Railroad Company, a Corporation

Appeals from the Order of the Court of Common Pleas of Allegheny County, Pa., at No. 2677, July Term, 1941

Opinion of the Court—Filed May 22, 1944

Linn, J.:

Plaintiff sued under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, 45 USCA 51 et seq. After a trial in which he got a verdict, a new trial was

granted, as the learned trial judge explained, because he had submitted to the jury defendant's liability for "* * * failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees * * *"; he stated that after reflection he had concluded that there was no evidence to support a finding of inadequate equipment or insufficient help and therefore a new trial was necessary to correct the error.

The defendant had presented a point for binding instructions which was refused and subsequently moved for judgment n.o.v., a motion which was also refused.

We now have two appeals, one by the plaintiff from the granting of a new trial, and the other by defendant from the refusal of its motion.

In addition to alleging the element of inadequate equipment and insufficient help, as to which the court said there was no evidence, the plaintiff alleged that he was injured by the negligence of defendant's servants. We think there [fol. 145a] was no evidence of such negligence.

Plaintiff was an experienced freight handler employed for years in defendant's freight station at Ellwood City, Pennsylvania. He was injured June 26, 1939, while engaged with two other employes in moving a pipe about thirty feet long and ten inches in diameter and weighing about 1000 pounds from a freight car across the freight house floor to the consignee's truck which was backed up to receive it. Three pieces of this pipe consigned to National Tube Company arrived in the freight car which stood alongside the freight house. An iron plate was fastened by the plaintiff to the floor of the car and to the floor of the freight house so that freight could be trucked from the car into the freight house. On another side of the freight house, the consignee's delivery truck was backed up to a door of the freight house to receive the pipes. The plaintiff was assisted by two men, Fanno and Miller. In moving the pipes the three men used what the evidence calls a "nose truck." The truck was nosed under the pipe which was then swung around so that it extended lengthwise over the truck, the front end of the pipe extending in front of the truck and the other end extending back over it and between the handles by which the truck was pushed. The plaintiff was on the right side holding the right handle of the truck with one hand and steadying the pipe with the other; Miller was on the left

side holding the left handle with one hand and steadying the pipe with his other hand; Fanno was somewhere about the front end of the pipe with his hands on it for the purpose of steadying it. The plaintiff testified that in that way "* * * the truck carried the weight," and that "All you had to do was push and steady it." They moved the first pipe across the freight house floor and pushed or shoved it forward on the consignee's delivery truck. The mishap occurred while moving the second pipe. The plaintiff testified that the accident occurred as they moved the pipe into the freight house from the freight car; the witnesses called by defendant testified that it hap-
[fol. 146a] pened as they were pushing the pipe on the consignee's truck. For present purposes it is immaterial which is correct because there is no proof of defendant's negligence.

Plaintiff's account states they loaded the pipe, or tube as some of the witnesses call it, on the nose truck. "As we went through the door the uneven part—Q. Which door are you talking about? A. The one coming into the warehouse from the car. It caused this pipe to slip—start slipping on the nose truck and the two men assigned to help me, they both let go of it and jumped and I tried to hold on to the truck in order to keep the truck from kicking me, if it would kick it would have broke my leg, which it kicked off to the side and the foot of the truck kicked me in the side. Q. What part of the truck hit you in the side? A. The foot at the leg on the nose truck. Q. Which side? A. What would be on the, I think, right side as you would be pushing the truck. * * * Q. What caused the pipe to slip? A. Well, the not adequate equipment, for the first thing, on account of it, just nothing but the nose truck; then the two men assigned to help me leaving go of it. Q. What was there at the door of the warehouse on the floor? A. Well, at the time there had been a plank, or a thick board had been nailed on there and then beveled so it would let you come up out of the warehouse on to the platform. * * * You had it on that truck longwise, longthwise? A. Yes, sir. Q. What did you do when that kicked out, when the truck kicked out? A. Well, when the two men jumped and left it go, I tried to hold on to it to keep from being hurt, but it was too much for me, I couldn't handle it. Q. With what force did it hit you? A.

Well, they kick with a violent force, when it starts back there with the weight on it, such as the tube was."

In his cross examination he gave substantially the same description. "Q. You started your truck over that with the second tube on it and over on to the station platform; then what did you do? A. Started right in the same procedure as with the first one. Q. How far did you get? A. [fol. 147a] We got right inside the door. Q. That is inside the warehouse door? A. Yes, sir. And the pipe started to slip and when it did Mr. Fanno and Miller let go of it. I tried to hold on to the truck to keep the truck from kicking back. When it would fall in the front this pipe would hit the floor and that caused the back end to raise up at a high angle; that would kick the truck back with a force, violent force, because there is 1000 pounds of weight there. I was trying to hold on, to keep the truck from kicking me in the legs; that is what would catch you when you keep back, so I tried to hold on to it. That made the pipe roll and that made the truck kick on the side and the truck leg struck me on the side." He and his fellow workmen then put the pipe on the truck again and moved it over to the consignee's truck and loaded it. They then put the third pipe on the consignee's truck by the same process.

We can see nothing in that evidence that would justify a finding that defendant's servants were negligent in handling the freight. As the witness said, when the pipe was balanced on the truck, "All you had to do was push and steady it"; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workman assumed: cf. *Guerierro v. Reading Co.*, 346 Pa. 187, 29 A. 2d 510; *Reusch v. Graetzinger*, 192 Pa. 74; 43 A. 398; *Cacchione v. Hagan & Co.*, 249 Pa. 32, 94 A. 440; *Penna. R. R. Co. v. Brubaker*, 31 F. 2d 939 (C. C. A. 6th, 1929).

Plaintiff's fellow workmen, who were called by the defendant, testified that the accident happened as they were loading the pipe on the consignee's delivery truck. If their testimony, either alone or taken with plaintiff's, would support a finding of negligence, it would be necessary to submit it to the jury even though plaintiff's own evidence was insufficient. But their evidence will not support such a finding. Miller was on the left side pushing the truck and steadying the pipe when "the front end of

the pipe" had already "started in the automobile truck." [fol. 148a] The pipe "over-balanced * * * so we let go of it." The witness said of the plaintiff "* * * I understand he tried to hold the handle of the truck but it kicked out and flopped over and hit him. * * *" In cross-examination, Miller was asked whether he knew "what caused that tube to slip." His answer was, "A. Well, the only thing I can account for that it was greasy." He was asked, "Q. What caused the handle to fly out of your hand? * * * A. Well, the weight of the tube. I didn't want to get hurt myself. When I seen we couldn't hold it, why I had to leave go."

The other fellow servant, Fanno, testified: "Q. You pushed the hand truck with Miller and Blair, right across the station platform until you got to the truck is that right? A. Yes, I was at the end of the pipe in the front. Q. Is that where the accident happened? A. Sir? Q. The accident happened right over by the automobile truck? A. The pipe was on the truck, on the Tube Mill truck, but you see before we get to that we give him push and pipe go right in all the way on the truck, and when little truck hit big truck why the truck kicked. Q. After the pipe came to rest was it on the truck? A. On the truck, all three on the truck, one never fall down on the ground."

In cross-examination he testified: "Q. You say that you skidded the pipe from the truck on to the bed of the automobile truck? A. Yes, sir, all three right on top of it. Q. Which one? A. All three. Q. All three? A. Yes, Sir. Q. If it went on the automobile truck how did it kick the little truck back? A. Why, I tell you. You see this here little truck was sitting right in here (indicating), little truck hit right in there (indicating) and kick back. Q. It hit the pipe on the truck? A. No, sir, hit against the Tube Mill truck and kick back, the weight of the pipe kick the truck back. Mr. Miller, he went away and it catch Mr. Blair."

Another witness, Main, who was the truck driver employed by the consignee, the National Tube Company, testified that he had been in the freight office. When he came out [fol. 149a] they had already put one of the pipes in his truck and were about to put the second one in it. He testified: "Q. What happened? A. They started it on the truck and they had it pretty near on the truck. My version of it is just as we got up to the truck bed, why, it kind of sloped

a little and it kicked back. Q. What kicked back? A. This truck, this two-wheel truck it was carried on."

The mere happening of this unfortunate accident is not evidence of negligence. The obvious risk of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves. We see no evidence to support a finding of negligence. Cf. *Detroit, G. H. & M. Ry. v. Maldonado*, 59 F. (2d) 911 (C.C.A. 6th, 1932).

The orders are reversed and judgment is here entered for defendant.

[fol. 150a] Supreme Court of the United States, October Term, 1944

No. 265

Order Allowing Certiorari—Filed October 9, 1944

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 151a] Supreme Court of the United States, October Term, 1944

No. 265

Order Granting Motion for Leave to Proceed in Forma Pauperis—November 13, 1944

On consideration of the motion by petitioner for leave to proceed further herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 265

CLARENCE W. BLAIR
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of Pennsylvania

and

BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

October Term, 1944

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CLARENCE W. BLAIR,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Clarence W. Blair, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on May 22, 1944.

Opinions Below

The opinion of the Common Pleas Court of Allegheny County, Pennsylvania, (R.133) is not reported.

The opinion of the Supreme Court of Pennsylvania (R.144) is reported in 349 Pennsylvania 346.

JURISDICTION

The statutory provision believed to sustain the jurisdiction of this Court is Sec. 237 of the Judicial Code as amended (U.S.C.A., Tit. 28 Sec. 344) which provides in its pertinent portion: (b) "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had . . . where any title, right, privilege or immunity is especially set up or claimed by either party under . . . any statute of . . . the United States . . ."

The Federal Employers Liability Act, 45 U.S.C. 51 provides: (Sec. 6 as amended)

> The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States . . ."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied with its common-law and statutory duty to provide Petitioner with reasonably safe and sufficient tools and appliances with which to perform his work?

2. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied

with its common-law and statutory duty to provide Petitioner with reasonably sufficient and skillful fellow-servants to perform the work?

3. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration as to whether Respondent was negligent in that two members of its makeshift unloading crew abandoned their hold on the load before exerting their utmost physical strength to avert the catastrophy?

4. Whether the Supreme Court of Pennsylvania erred in re-examining the facts to a different conclusion, after they had been submitted to a jury which found Respondent negligent and assessed the damages at Twelve thousand dollars?

5. Whether the Amendment to the Federal Employers Liability Act of August 11, 1939 applies to this case which occurred June 26, 1939 and suit was not brought until June 18, 1941?

CONSTITUTION and STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers Liability Act as amended (45 U.S.C. 51) which provides in part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT

Petitioner, Respondent's sole freight house employee at Elwood City, Pa., brought this action under the provisions of the Federal Employers Liability Act in the Common Pleas Court of Allegheny County, Pa., to recover for personal injuries resulting in permanent and total disability, which he sustained on June 26, 1939 while unloading an interstate shipment of three steel pipes or tubes weighing in excess of a thousand pounds each and being approximately thirty feet in length and ten inches in diameter. The pipes were greased. The only tools and appliances furnished were two hand trucks, obviously designed for moving trunks, bales and boxes, a dolly, a crow-bar (Photo R. 138) and several short lengths of discarded iron pipe; there were no pipe-tongs, chain-hoists or other mechanical appliances provided to securely engage and carry this type of freight. Petitioner being physically unable to remove the pipe from the box-car with the equipment furnished him, consulted his superior, Respondent's Station Agent and requested

that the pipe be left in the car and be thus delivered to Consignee's mill in Elwood City, where adequate mechanical unloading facilities were available, as had been Respondent's practice theretofore when heavy freight arrived. The Station Agent overruled the suggestion and ordered Petitioner to call upon the aging and infirm car-inspector to assist him, and also to commandeer the services of the section-foreman (whose gang was not at work on that day) which was accordingly done. Neither of these men summoned from other employments was experienced in this type of work and Petitioner being unable to approve their skill, told the Agent he didn't think the three could do it (R 15) whereupon the Agent preemptorily replied that if he couldn't do the work they would get somebody else who would. (R. 15)

Thereupon Petitioner with the car-inspector and the section foreman entered the box-car and succeeded in lifting one of the pipes upon the hand truck which was about five feet long, the pipe extended beyond the truck both fore and aft some twelve feet and it was necessary for the men upon their haunches to hold the truck handles close to the floor and thus move the heavy load thereby keeping the pipe on an even keel or in a horizontal position so that the forward end would not gouge into the floor and upset the unstable vehicle. A number of zig-zag movements were necessary to get the long pipe out the center door of the box-car and across the steel plate to the freight house platform then through the freight house to the door on the far side where consignee's truck was waiting to receive them. The first pipe was managed. The second pipe while thus being transported

across the freight house floor with the men crouching, struck an uneven place in the floor and the greased pipe started to slip from its insecure moorings; the car-inspector and the section-foreman let go their holds and scurried for safety; the pipe fell off kicking the hand truck backward with great violence, the leg of it striking Petitioner in the abdomen just under the floating ribs.

Petitioner's Statement of Claim (R. 7) averred insufficiency of tools and appliances with which to do the work; inadequate and unskilled help and the negligence of the fellow employees in releasing their hold on the pipe to Petioner's peril.

The case came on for trial and at the close of the evidence Respondent moved for a directed verdict, which was refused. The case was submitted to the jury under a comprehensive exposition of the law by the trial judge. (R. 112) After deliberation the jury found Respondent negligent and assessed the damages at Twelve thousand dollars. Respondent then moved for a new trial and also moved for judgment notwithstanding the verdict. The latter motion was overruled but after long deliberation the court granted a new trial for the sole reason (Certificate of Trial Judge to that effect R. 137) as stated in the opinion: (R. 135)

> "Plaintiff contended that the defendant was answerable for negligence in three particulars, viz., failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees as described above. The trial judge

asked the jury to pass on all three particulars. This was error."

"While there was sufficient testimony to support the third particular and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either. We cannot now determine on which particular the jury found the defendant had been negligent, and a new trial will be granted."

"Because we considered the verdict in this case to be just and reasonable, we have deliberated a long time before ordering a new trial. In order that neither party may be further delayed the case will be listed for trial immediately after the resumption of jury trials in September next."

Respondent appealed to the Supreme Court of Pennsylvania from the refusal of its motion for judgment notwithstanding the verdict.

Respondent having appealed, Petitioner thereupon also appealed from the order granting a new trial, being of the opinion the trial court did not err in submitting to the jury the alleged failure to provide adequate equipment for the work and the alleged failure to provide sufficient help. Had we gone into a second trial, the second trial judge under the stare decisis rule would doubtless have excluded inadequate equipment and insufficient help from the second jury's consideration, to the great prejudice of your Petitioner, by depriving him of the benefit

before the jury of the two most culpable insufficiencies alleged, the failure to perform the primary common law duties.

The Supreme Court of Pennsylvania after argument, on May 22, 1944 entered judgment for Respondent, holding: (Opinion R. 144)

> "In addition to alleging the elements of inadequate equipment and insufficient help, as to which the court said there was no evidence, the plaintiff alleged that he was injured by the negligence of defendant's servants. We think there was no evidence of such negligence."
>
> "As the witness said, when the pipe was balanced on the truck, 'All you had to do was push and steady it'; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workmen assumed."
>
> "The mere happenings of this unfortunate accident is not evidence of negligence. The obvious risk of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves. We see no evidence to support a finding of negligence."

Thus the learned Court dismissed the question of the "insufficiency" of a five foot hand truck to wheel a thirty foot, 1000 pound greased cylinder that would roll off except for the steadying hands of the crouching, moving men simultaneously keeping the pipe horizontal or on an even keel and at the same time pushing the heavy, precariously balanced load.

No mention is made in the opinion of the unusual and extraordinary nature of the work necessitating the calling in of the section foreman and the car inspector to assist; their age, waning vigor, appearance or inexperience apparently raises no issue of lack of sufficient help or due care, and Petitioner under the decision must assume the risk "that men would instinctively act to protect themselves" no matter how indifferent or feeble their effort to avert serious accident.

Under the decision a workman assumes the risk of injury from the carelessness of a fellow employee with whom he has never worked before, and whose skill and ability he has had no reasonable time to appraise.

SPECIFICATIONS OF ERROR TO BE URGED

1. In entering judgment for Respondent.

2. In failing to reverse the Trial Court's order granting a new trial, the alleged error in instructing the jury being without merit.

REASONS FOR GRANTING OF WRIT

1. Petitioner's constitutional guarantee of trial by jury has been violated.

2. The decision of the Supreme Court of Pennsylvania is in conflict with the decisions of this Court as expressed in *Bailey, Admx. vs. Central of Vermont*, 319 U.S. 350; *Pederson vs. D. L. & W. Ry. Co.*, 229 U.S. 146; *Tennant vs. Peoria and P. U. Ry. Co.*, 321 U.S. 29.

CONCLUSION

it should be granted.

Respectfully submitted,

CLARENCE W. BLAIR

by J. THOMAS HOFFMAN and
RANDALL B. LUKE,
Attorneys for Petitioner.

The only mechanical tools and appliances furnished
ellant, the single freighthouse man, to unload the
sand pound, thirty foot, greased pipe, were two hand
ks and a dolly. (Photo R. 138) These were ob-
sly designed to move trunks, bales and boxes and were
lly unsuited to move greased cylindrical objects of
t length and weight, which overloaded and overhung
hand truck a distance of twelve feet in each direction,
fore and aft. The pipe had to rest on the horizon-
metal nosing of the truck's forward end, with nothing
ecure it or prevent its dangerous rolling or shifting
pt the steadying hands of the two hastily summoned,
perienced and unskilled, aging and infirm albeit kind-
nd willing members of the improvised emergency labor
g. The manual movement of heavy pipe calls in
mon knowledge for the employment of pipe-tongs,
re the men stretched along both sides of the length
he pipe, like pall-bearers carrying a lighter burden,
bearing a fractional part of the load and the factor
afety being such that if one man releases his hold, it
n't result in dire consequences. Goose-neck cranes and
table chain hoists are also well known appliances in com-
use for moving such loads with facility and ease.

When the master in modern industry or transporta-
employs methods that savor of the ox-cart era, and
emptorily orders his servant to encounter dangerous
k with insufficient and inadequate tools and appliances
with inexperienced and unskilled help, hastily sum-
ed from their regular inspection and supervisory em-
yments requiring no great muscular exertion, and in

the performance of the temporary assignment an easily anticipated accident results and a workman's earning power is permanently destroyed, may it be said there is no evidence of culpability on the part of the master for a jury's consideration, under a statute which provides for liability if the accident be due in whole or in part to insufficiency in men or appliances and/or negligence of fellow employees? Our imagination pictures no more obvious inadequacy or insufficiency than is here presented unless it be the proverbial furnishing of a fork for eating soup.

The trial court after refusing the motion for a directed verdict and after the jury's $12,000.00 verdict for Appellant, refused the motion for judgment notwithstanding the verdict but granted the motion for a new trial on the sole ground (court so certified R. 137) that the Court had erred in submitting to the jury for its consideration the questions of reasonably safe tools and appliances and the sufficiency of the help provided. Those we say were both questions of fact for the fact finding body. We submit the Court was right the first time when those questions were submitted to the jury, and erred when it later concluded it had erred in so doing. The Court stated in the opinion (R. 136) that the verdict was fair and reasonable and that it had deliberated a long time; torn, perhaps, between varying considerations to grant or refuse the motion for a new trial.

The new trial was never reached, Respondent appealed to the Supreme Court of Pennsylvania from the refusal of its motion for judgment nothwithstanding the verdict and Appellant then also appealed from the order

granting a new trial, believing the trial Court had committed no error warranting a re-trial.

The Pennsylvania Supreme Court figuratively finished the tree-pruning process and sawed off the last remaining of the three limbs: the negligence of the fellow employes in releasing their hold of the pipe before exerting the utmost of their strength, thus causing the load to fall and the truck to kick back with terrific violence and strike the Appellant. The Supreme Court held there was no evidence of negligence under the Federal Employers Liability Act for submission to the jury and entered judgment for Respondent; this petition for Certiorari follows, Appellant believing that his Constitutional right to trial by jury has been violated; that reading the testimony in a light most favorable to him he was entitled to have the jury determine which evidence it would believe and pass on the credibility of the witnesses whom they met face to face and whose physical vigor and strength they could in some measure observe, rather than have an appellate court re-examine the evidence from the cold type of a printed record and arrive at a different conclusion, although denied the benefit of seeing and hearing the witnesses and observing their demeanor, to determine their candor or freedom from prejudice or mental reservation.

AUTHORITIES

Pederson vs. D. L. & W. R. R. Co., 229 U.S. 147

This was an action under the Federal Employers Liability Act to recover for personal injuries sustained through the negligence of co-employes. At

the trial the court refused to direct a verdict for defendant; the jury found for plaintiff. Subsequently the Court following the local statute (Penna. Laws 1905 p. 286 c. 198) entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. Mr. Justice Van Devanter in the opinion said "In this the Court was in error, first because it was without authority to do so (*Slocum vs. N. Y. Life Ins. Co.*, 228 U.S. 364) and second because the evidence did not warrant such a judgment."

Thomkins vs. Erie R. R. Co., 98 Fed. 2nd 49
Certiorari denied 305 U.S. 637
Rehearing denied 305 U.S. 673

"A plaintiff has a right to a jury trial in an action for injuries when any issue of fact remains to be settled."

Robostelli vs. N. Y. R. Co., (C.C.A. N. Y. 1888)
33 Fed. 796

"This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established."

Justices vs. Murray (N. Y. 1870)
9 Wall. 278; 19 L.E. 658.

This clause applies to the appellate powers of the United States in all common law cases coming up

from inferior federal courts and also in cases of federal cognizance coming up from a state court.

Chicago R. Co. vs. Chicago, 166 U.S. 242.

The last clause of this amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court of the United States by writ of error from the highest court of the state.

Jacob vs. City of New York, 315 U.S.752

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Ives vs. Grand Trunk R. R. Co.
35 Fed. 176, Affirmed 144 U.S. 408

The weight and balancing of evidence are for the jury and their conclusion upon it in respect to its preponderance when fairly reached, is not reexaminable. When a case is such that it must be submitted to a jury, conclusiveness of the verdict must follow.

THE SUPREME COURT OF PENNSYLVANIA ERRED IN HOLDING THERE WAS NO JURY ISSUE

Chicago & N. W. R. Co. vs. Bowers, 241 U.S. 470

"The rule of law is: That the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but it is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable."

Tiller vs. Atlantic & C. L. R. Co. 318 U.S. 54

". . . Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

"Where the facts are in dispute and the evidence in relation to them is that from which fair minded men may draw different inferences, the case should go to the jury."

Union Pac. R. Co. vs. Hadley, 246 U.S. 330

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling on each. But the whole may be greater than the sum of its parts and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed

to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

Galloway vs. U. S. (Cal. 1943) 319 U.S. 372; rehearing denied 320 U.S. 214

The remedy for abuse of discretion by court in ruling on question whether evidence is sufficient for submission to jury is by correction on appellate review. The essential requirement in determining whether evidence is sufficient for jury is that mere speculation be not allowed to do the duty of probative facts after making due allowances for all reasonably possible inferences favoring party whose case is attacked.

Bailey vs. Central Vermont Ry. 319 U.S. 350

The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. *Jones vs. E. Tenn. V. & G. R. Co.* 128 U.S. 128.

To withdraw such questions from the jury is to usurp its functions. The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence. It is a part and parcel of the remedy afforded railroad workers under the Federal Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. To deprive these workers of the benefit of a jury

trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Great Northern R. Co. vs. Leonidas, 305 U.S. 1

"We are not prepared to say that the hazard of carrying a railroad tie was so open and obvious that the plaintiff as a matter of law must be held to have assumed the risk of injury by yielding obedience to the command of the foreman. He lifted and carried it successfully until he stepped on the rock and turned his ankle, at which time he fell with the weight on his back. This was a situation that the jury was warranted in finding defendant railway company and its foreman in the exercise of reasonable care, should have anticipated in the light of common experience."

Northern Pacific R. R. Co. vs. Herbst, 116 U.S. 464

"A servant does not by his contract of employment assume the risks arising from the want of sufficient and skillful co-laborers. The liability of the employer is the same whether he totally fail to provide persons to perform a duty he owes his servants, or provide persons who are unskilled and incompetent."
Tenant vs. Peoria, P. U. Ry. Co., 321 U.S. 29

"A judgment for defendant notwithstanding a verdict for plaintiff deprived the latter of the right of trial by jury."

"The court is not free to reweigh the evidence and set aside the jury verdict merely because the jury

could have drawn different inferences or conclusions or because the court regards another result as more reasonable."

C. R. I. & P. R. Co. vs. Ward, 252 U.S. 18

"The defense of assumption of risk is inapplicable when the injury arises from a single act of negligence creating a sudden emergency without warning to the servant or opportunity to judge the resulting danger."

C. B. & Q. vs. U. S. 220 U.S. 574

"It is quite conceivable that Congress contemplated the inevitable hardship of such injuries and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard."

It is respectfully submitted that the judgment sought to be reviewed is not in harmony or accord with the decisions of this Court under the Act; that the question is a substantial one and that a writ of certiorari should be issued.

J. Thomas Hoffman
Randall B. Luke
Attorneys for Petition

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 265

CLARENCE W. BLAIR,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

ON WRIT OF CERTIORARI

To The Supreme Court of Pennsylvania

PETITIONER'S BRIEF

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SUPREME COURT OF THE UNITED STATES

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CLARENCE W. BLAIR,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

PETITIONER'S BRIEF

OFFICIAL REPORT OF OPINIONS BELOW

The opinion of the Common Pleas Court of Allegheny County, Pa., (R. 133) is not officially reported.

The opinion of the Supreme Court of Pennsylvania (R. 144) is reported at 349 Pennsylvania Reports 346; 37A (2d) 736.

GROUNDS OF JURISDICTION

The question presented in this case is a substantial one. It is, briefly, the right of Petitioner to recover from Respondent under the Federal Employers' Liability Act (U.S.C.A., Tit. 45, 51-59) under the evidence adduced at the trial, when viewed in the light most favorable to petitioner. The interpretation of the Act is necessarily involved, and the right of submission of the issue to the jury was denied by the Supreme Court of Pennsylvania, as a matter of law. The question is what constitutes actionable negligence under the Act, and the Opinion of the Supreme Court of Pennsylvania is not in accord with the applicable decisions of this Court. The applicability of the Federal Employers' Liability Act is not in controversy and the decision of the Supreme Court of Pennsylvania is based entirely upon the interpretation of the Act, holding the Act applicable and purporting to determine Petitioner's rights thereunder; denying however, that he had a cause of action under the terms thereof. The opinion begins:

> "Plaintiff sued under the Federal Employer's Liability Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U.S.C.A. 51 et seq."

It is not denied that Petitioner's Statement of Claim pleaded facts which, if proved, brought the case within the purview of the Act.

Section 237 of the Judicial Code, as amended (U.S. C.A., Tit. 28, Sec. 344), provides in its pertinent portion:

"(b) It shall be competent for the Supreme Court, by certiorari to require that there shall be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is especially set up or claimed by either party under . . . any statute of . . . the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. . . ."

The jurisdiction of this Court to review the judgment below is supported by:

Seaboard Air Line Ry. v. Renn 241 U.S. 290, 60 L.ed. 1006, 36 S. Ct. 567; C. R. I. & P. Ry. Co. v. Devine 239 U.S. 52, 60 L.Ed. 140, 36 S. Ct. 27 Union Pac. R. Co. v. Hadley 246 U.S. 330, 62 L.Ed. 751, 38 S. Ct. 318.

STATEMENT OF THE CASE

This is an action at law brought by Petitioner against Respondent in the Common Pleas Court of Allegheny County, Pennsylvania under the provisions of the Federal Employers' Liability Act to recover for personal injuries sustained by Petitioner while in the employ of Respondent and engaged at the time of the injury in unloading an interstate shipment of merchandise. The case was submitted to the jury to pass on the issues of whether Respondent furnished reasonably adequate

tools and appliances to perform the work; whether Respondent furnished reasonably sufficient and competent help to perform the work and whether the men hastily summoned to perform extraordinary duties were negligent in the performance thereof. The jury found Respondent negligent and assessed the damages at $12,000.00. Respondent moved for *Judgment Notwithstanding the Verdict* and also moved for a new trial. The Court overruled the motion for Judgment Notwithstanding the Verdict but granted the motion for a new trial on the ground, as stated in the opinion (R 135) that the Court submitted to the jury the questions of negligence in three particulars, failure to provide adequate equipment, failure to provide sufficient help and carelessness of its employees; that there was sufficient testimony to support the third particular, and therefore to permit the plaintiff to recover, but that there was no sufficient testimony to support the first and second, although under the charge of the court, the jury was permitted to base a recovery on either. The court said: "We can not now determine on which particular the jury found the defendant had been negligent, and a new trial will be granted. Because we considered the verdict in this case to be just and reasonable, we have deliberated a long time before ordering a new trial." (R. 136)

Respondent appealed to the Supreme Court of Pennsylvania from the refusal of the trial Court to grant its motion for Judgment n.o.v., and your Petitioner thereafter appealed from the order granting a new trial, on the ground that if the case were again tried, under the rule of *stare decisis*, two of his three allegations of negligence would not be submitted to the jury, thereby un-

duly narrowing his cause of action and resulting chance of recovery. The Supreme Court of Pennsylvania sustained Respondent's appeal and entered judgment for Respondent; the Court holding there was no evidence of the sole remaining allegation of negligence, to-wit: the negligence of the fellow-employees' for submission to the jury. Thus by a series of decimations the allegations of negligence were by two and one all killed off, and Petitioner's right to trial by jury was denied.

Petitioner, Respondent's sole freight house employee at Ellwood City, Pa., in unloading a car of merchandise on June 26, 1939 at the freight house, came upon three thirty foot lengths of greased seamless steel tubing ten inches in diameter and weighing in excess of one thousand pounds each. These tubes were lying on the floor of the freight car. Respondent provided no facilities by which a lone employee could remove the tubes from the car, except the nose-trucks and crow-bars (Photo R.138) which were grossly unsuited for moving heavy greased pipe of great length. Petitioner requested his superior, the station agent, to send the car to the consignee's plant, a few city blocks distant, for unloading, as had been done on former occasions when heavy shipments arrived, since the consignee had facilities for handling and unloading heavy objects. The station agent disapproved the suggestion and ordered Petitioner to unload the tubes and to call in Mr. Miller, an aging car-inspector and Mr. Fanno, the section-boss, to assist. When Petitioner questioned the ability of such improvised and inexperienced assistance, he was summarily informed by the station agent that if he couldn't do the work they would get somebody else who would. (R. 15)

Thereupon Petitioner with the car-inspector and the section-boss entered the box-car and succeeded in lifting one of the thirty foot tubes upon the five foot nose truck, the tube extending beyond the truck both fore and aft some twelve feet or more, and moving upon their haunches, holding the truck handles close to the floor to keep the greased tube on an even keel or in a horizontal position so that the forward end of it would not gouge into the floor and upset the unstable vehicle, they succeeded in making a number of zig-zagging movements to get the long tube out the center door of the box-car and across the steel plate from the car to the station platform, then through the freight house to the door on the far side where consignee's truck had arrived to receive the shipment. The floor of the freight house was rough, it had sunk so a beveled two inch plank had been nailed on the floor just inside the door to make the descent from the platform more gradual. The first tube was managed. The second, while being similarly transported across the freight house floor with the men moving in a crouching position struck an uneven place in the floor and the greased pipe started to slip from its insecure moorings; the car inspector and the section boss let go their holds and scurried for safety; the pipe fell off kicking the nose truck backward with great violence, the leg of it striking Petitioner in the abdomen just under the floating ribs. Pneumonia contracted following his hospitalization and operation has left Petitioner in such delicate condition that even serving as a crossing watchman during the month of August proved too much for him and the company doctor ordered him off the job. Since then he has been totally disabled.

ASSIGNMENT OF ERRORS

1. The Supreme Court of Pennsylvania erred in holding there was no jury issue of negligence of Respondent's servants who released their hold on the pipe before exerting their utmost effort to prevent the accident.

2. In holding there was no jury issue as to whether a five foot nose-truck was a reasonably safe appliance to move a thirty foot long greased pipe weighing in excess of a thousand pounds.

3. In holding there was no jury issue of failure to supply reasonably sufficient and competent help when the master improvises a work gang of inexperienced infirm and aged men to perform heavy dangerous work with inadequate appliances.

4. In failing to consider the various elements of negligence as a whole and as inter-related, instead of denying each separately and as unrelated to the contributing elements.

ARGUMENT

The only mechanical tools and appliances furnished Petitioner, the sole employee in the Ellwood City freight house, to unload from a box car the thousand pound, thirty foot long, greased ten inch pipe, were two nose trucks and a dolly. (Photograph R. 138) These were obviously designed to move trunks, bales and boxes and were wholly unsuited to move greased cylindrical objects of great length and weight which overhung the five foot nose truck a distance of twelve feet or more both fore and aft. Then too, the pipe had to rest on the horizontal metal nosing at the truck's forward end, with nothing to secure it or prevent its dangerous shifting or sliding or rolling except the steadying hands of two hastily summoned, unskilled and inexperienced, aging and infirm, albeit kindly and willing members of the improvised labor gang. The manual movement of heavy pipe calls in common knowledge for the employment of pipe tongs, where the bearers walking abreast on both sides of the pipe, spaced at intervals along its entire length, each carrying a fractional part of the load and the factor of safety being such that should one man inadvertently slip or lose his hold it wouldn't result in dire consequences to the others similarly employed. Goose neck cranes, portable chain hoists and blocks and tackles are among the well known appliances in general use for moving such loads with facility and ease.

When the master in modern industry or transportation employs methods that savor of the ox-cart era, and peremptorily orders his servant to encounter dangerous work with inadequate and insufficient tools and appliances

and with inexperienced and unskilled help, hastily summoned from employments requiring little or no muscular exertion, to perform a temporary assignment requiring great physical strength and vigor, and an easily to be anticipated accident results because of the lack of strength coupled with inadequate tools, and a willing workman's earning power is thereby permanently destroyed, resulting in calamity to his family, may it be said there is no culpability on the part of the master, for the jury's consideration under the provisions of a wise and humane statute which provides for liability if the accident be due in whole or in part to insufficiency in men or appliances and/or the negligence of fellow employees?

The trial court after refusing the motion for a directed verdict and after the jury returned a verdict in the sum of $12,000.00 for Petitioner, refused Respondent's motion for *judgement nothwithstanding the verdict* but granted the motion for a new trial solely on the ground (Court so certified R.137) that the Court had erred in submitting to the jury for its consideration the questions of whether the master complied with his common law primary duties of furnishing reasonably safe tools and appliances with which to perform the work and reasonably sufficient and competent help to assist in the performance. Those, we submit, were both questions of fact for the consideration of the fact finding body. We submit the learned trial court was right the first time when he submitted those questions to the jury and only erred when he later concluded he was wrong in so submitting them. The Court stated in the opinion: (R.136)

"Because we considered the verdict in this case

to be just and reasonable, we have deliberated a long time before granting a new trial,"

The Court was likely torn between varying considerations to grant or refuse a new trial.

The new trial never was reached, Respondent appealed to the Supreme Court of Pennsylvania from the refusal of its motion for *judgment notwithstanding the verdict* and Petitioner then also appealed from the order granting a new trial, believing the trial Court had committed no error warranting a retrial. Petitioner appealed for the further reason that should the case be retried, under the rule of *stare decisis*, at the second trial two of his three allegations of negligence would not be submitted to the jury, thereby depriving him of the benefit before the jury of the two most culpable insufficiencies—men and machines.

PENNSYLVANIA SUPREME COURT OPINION

The Pennsylvania Supreme Court in its opinion (R.143) simply says:

> "In addition to alleging the element of inadequate equipment and insufficient help, as to which the Court said there was no evidence, the plaintiff alleges he was injured by the negligence of the defendant's servants. We think there was no evidence of such negligence."

The learned Court accepts as final and without comment the action of the trial court in ruling out two of the three allegations of negligence which had been submitted to

the jury and completes the destruction of Petitioner's constitutional guarantee by striking down the last remaining allegation of negligence which we proved to the jury's satisfaction.

Continuing, the Pennsylvania Supreme Court says:

> "We see nothing in that evidence that would justify finding that defendant's servants were negligent in handling the freight. As the witness said, when the pipe was balanced on the truck, "All you had to do was push and steady it"; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workman assumed."

Yes, all one had to do, if, as and when he could keep the greased pipe perfectly *balanced* was to crouch, keep the pipe perfectly horizontal while moving it across the uneven floor, keep the truck handles close to the floor, push the heavy unstable load while in a stooped position and move and steady it at the same time. It sounds simple. But crossing Niagara Falls on a slack wire also sounds simple; all one has to do when he is *balanced* is to plant one foot ahead of the other and make for the Canadian shore.

The Court says a risk of the employment is that the equilibrium of the pipe might be disturbed. That statement we think is not sufficiently comprehensive. The risk is not assumed until the servant knows and appreciates the hazard. It is not assumed when the servant is summarily directed to move heavy pipes of a size he had had no previous experience in moving.

Q. You never unloaded any before in the freight house?

A. I unloaded different kind of tubing, not of this nature, as large or as long as these three pieces were. (35 R)

****

Q. Before you had gone in the agent's office in the freight house had you tried to lift the tubing?

A. No sir, I didn't try because it was customary with large stuff that came to the National Tube to leave it in the car and seal the car again and shove it up into their mill where they had proper equipment for unloading heavy material.

Q. Had you ever shipped up steel tubing before?

A. Yes, sir.

Q. Only three pieces of it?

A. Even as low as one piece. (R.35)

Nor does one assume the risk of working with men whose skill he had not had time to appraise:

Q. You never worked with Mr. Fanno before?

A. He never helped me unload material. (R.35)

Nor does one assume the risk under the statute of being required to perform work with inadequate appliances such as a five foot nose truck to move a thirty foot pipe; the truck not being designed to carry cylindrical objects of great weight and length.

But the Respondent argues Petitioner was not directed to use the nose truck in moving the pipe. That is true, but he had to use something and it is not contended that he had the choice of more suitable appliances for the purpose.

Continuing the Court says:

> "The mere happening of this unfortunate accident is not evidence of negligence, the obvious risk of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves."

We submit the mere happening of this accident with its attendant circumstances evidences a gross disregard for the safety of the Petitioner both as to furnishing him reasonably adequate or sufficient tools and appliances with which to perform the work assigned him; that the mere happening of this accident was the readily to be anticipated result of failure to supply reasonably skilled and vigorous assistants to perform heavy, dangerous work. The hastily summoned car-inspector and section-boss unused to this type of work or perhaps to any manual lifting or steadying of great weights at all, constituted a grotesque Gilbert & Sullivan comic opera working gang. The mere happening of this unfortunate accident bespeaks not "Saftey first" but safety last. The servant's primary duty is obedience. He may not be too critical of the master's methods.

The Supreme Court of Pennsylvania erred in failing to consider the respective allegations of negligence as a whole. Pulling each separate factor from its factual set-

ting distorts and discolors the facts as a whole and is completely opposed to the standard of interpretation laid down for this Act by the late Mr. Justice Holmes:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

Union Pac. R. Co., vs. Hadley, 246 U.S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

It is difficult to conceive of a judicial view of the facts here presented more in conflict with the principle of liberal construction of the Act in the light of its prime purpose, the protection of employees against injury, set forth by Mr. Justice Murphy in *Lilly vs. Grand Trunk W.R. Co.*, 317 U.S. 481, 87 L.Ed.323, than the view accorded these facts by the Supreme Court of Pennsylvania.

AUTHORITIES

Pederson vs. D. L. & W. R. R. Co., 229 U.S. 147

This was an action under the Federal Employers Liability Act to recover for personal injuries sustained through the negligence of co-employes. At the trial the court refused to direct a verdict for de-

fendant; the jury found for plaintiff. Subsequently the Court following the local statute (Penna. Laws 1905 p. 286 c. 198) entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. Mr. Justice Van Deventer in the opinion said "In this the Court was in error, first because it was without authority to do so. (*Slocum vs. N. Y. Life Ins. Co.*, 228 U.S. 364) and second because the evidence did not warrant such a judgment."

Thomkins vs. Erie R. R. Co., 98 Fed. 2nd 49
Certiorari denied 305 U.S. 637
Rehearing denied 305 U.S. 673

"A plaintiff has a right to a jury trial in an action for injuries when any issue of fact remains to be settled."

Robostelli vs. N. Y. R. Co., (C.C.A. N. Y. 1888)
33 Fed. 796

"This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inference as to the exercise of due care to be drawn from the facts when established"

Justices vs. Murray (N. Y. 1870)
9 Wall 278; 19 L.Ed. 658

This clause applies to the appellate powers of the United States in all common law cases coming up

from inferior federal courts and also in cases of federal cognizance coming up from a state court.

Chicago R. Co. vs. Chicago, 166 U.S. 242.

The last clause of this amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court of the United States by writ of error from the highest court of the state.

Jacob vs. City of New York, 315 U.S. 752

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Ives vs. Grand Trunk R. R. Co.
35 Fed. 176, Affirmed 144 U.S. 408

The weight and balancing of evidence are for the jury and their conclusion upon it in respect to its preponderance when fairly reached, is not reexaminable. When a case is such that it must be submitted to a jury, conclusiveness of the verdict must follow.

THE SUPREME COURT OF PENNSYLVANIA ERRED IN HOLDING THERE WAS NO JURY ISSUE

Chicago & N. W. R. Co. vs. Bowers, 241 U.S. 470

"The rule of law is: That the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but it is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable."

Tiller vs. Atlantic & C. L. R. Co., 318 U.S. 54

". . . Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

"Where the facts are in dispute and the evidence in relation to them is that from which fair minded men may draw different inferences, the case should go to the jury."

Union Pac. R. Co. vs. Hadley, 246 U.S. 330

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling on each. But the whole may be greater than the sum of its parts and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks sep-

arately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

Galloway vs. U. S. (Cal. 1943) 319 U.S. 372; rehearing denied 320 U.S. 214

The remedy for abuse of discretion by court in ruling on question whether evidence is sufficient for submission to jury is by correction on appellate review. The essential requirement in determining whether evidence is sufficient for jury is that mere speculation be not allowed to do the duty of probative facts after making due allowances for all reasonably possible inferences favoring party whose case is attacked.

Bailey vs. Central Vermont Ry., 319 U.S. 350

The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. *Jones vs. E. Tenn. V. & G. R. Co.*, 128 U.S. 128.

To withdraw such questions from the jury is to usurp its functions. The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence. It is a part and parcel of the remedy afforded railroad workers under the Federal Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly

portion of the relief which Congress has afforded them.

Great Northern R. Co. vs. Leonidas, 305 U.S. 1

"We are not prepared to say that the hazard of carrying a railroad tie was so open and obvious that the plaintiff as a matter of law must be held to have assumed the risk of injury by yielding obedience to the command of the foreman. He lifted and carried it successfully until he stepped on the rock and turned his ankle, at which time he fell with the weight on his back. This was a situation that the jury was warranted in finding defendant railway company and its foreman in the exercise of reasonable care, should have anticipated in the light of common experience. "

Northern Pacific R. R. Co. vs. Herbst, 116 U.S. 464

"A servant does not by his contract of employment assume the risks arising from the want of sufficient and skillful co-laborers. The liability of the employer is the same whether he totally fail to provide persons to perform a duty he owes his servants, or provide persons who are unskilled and incompetent."

Tenant vs. Peoria, P. U. Ry. Co., 321 U.S. 29.

"A judgment for defendant notwithstanding a verdict for plaintiff deprived the latter of the right of trial by jury."

"The court is not free to reweigh the evidence and set aside the jury verdict merely because the jury

could have drawn different inferences or conclusions or because the court regards another result as more reasonable."

C. R. I. & P. R. Co. vs. Ward, 252 U.S. 18

"The defense of assumption of risk is inapplicable when the injury arises from a single act of negligence creating a sudden emergency without warning to the servant or opportunity to judge the resulting danger."

C. B. & Q. vs. U.S., 220 U.S. 574

"It is quite conceivable that Congress contemplated the inevitable hardship of such injuries and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard."

It is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed; that the order of the Common Pleas Court of Allegheny County, Pennsylvania granting a new trial be overruled and judgment ordered to be entered on the verdict.

J. Thomas Hoffman
Randall B. Luke
Attorneys for Petition

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 265

CLARENCE W. BLAIR,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Baltimore and Ohio Railroad Company, Respondent, respectfully presents the following Brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania:

Clarence W. Blair, Plaintiff and Petitioner, seeks to have the judgment of the Supreme Court of Pennsylvania reviewed by your Honorable Court. There is no question but that the Supreme Court of the United States has the power to review such judgment provided the petitioner brings himself within the provisions of the applicable Act of Congress and the decisions of the Court. However, as has been said by Mr. Justice Pitney in *Hamilton Brown Shoe Company vs. Wolf Brothers and Company*, 240 U. S. 251, 60 L. E. E. 629, 36 Supreme Court 269-271: "This is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision."

We call attention to Supreme Court Rule 35, paragraph 5, as found in 28 U. S. C. A. at p. 424 as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

We submit that neither of the conditions mentioned in subdivision (a) above quoted exist in the present case.

There is nothing unusual about this case which should commend it to the highest court in our country. It is an action instituted under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. sec. 51) by an employee against the railroad employer to recover damages for personal injuries sustained by him in the course of his employment. The burden of proving negligence on the part of the railroad, and that such negligence was the proximate cause of his injuries, rested upon the plaintiff. This case was tried in the Court of Common Pleas of Allegheny County, Pennsylvania, and the jury rendered a verdict in his favor in the amount of Twelve thousand ($12,000.00) Dollars. Thereafter, the court having refused defendant's point for binding instructions in its favor, defendant asked for judgment notwithstanding the verdict under the provisions of the Pennsylvania Act of April 22, 1905, P. L. 286, sec. 1; 12 Purdons Statutes sec. 681. The court refused to grant judgment n. o. v. because as stated in the Opinion, "there might have been some negligence in the manner in which the pipe was handled by the fellow employees of the plaintiff", but because of an error in the Charge, a new trial was granted. From the order refusing judgment n. o. v. the defendant appealed to the Supreme Court of Pennsylvania, and from the order granting a new trial the plaintiff appealed likewise. The two appeals were argued at length before the Pennsylvania Supreme Court, and finally that Court set aside both orders and entered judgment for the defendant n. o. v.

Argument

There are two grounds only urged by the petitioner as reasons for granting the writ. The first of these grounds is that the petitioner's constitutional guarantee of trial by jury has been violated. He bases this contention upon the 7th Amendment to the Constitution of the United States, which provides inter alia that, "in suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law". If the contention of the petitioner is correct, then no judgment notwithstanding the verdict could be entered in any action at common law. It is a well known fact that judgments of this nature have been entered by the courts both State and Federal in many actions instituted under the Federal Employers' Liability Act, which is a common law action.

In the early case of *The Justices, etc. vs. United States ex rel. Murray*, 76 U. S. 658, 9 Wall. 274-282, it is decided that:

> "* * * the 7th Amendment could not be invoked in a State Court to prohibit it from re-examining, on a writ of error facts that had been tried by a jury in the court below".

This case is cited in the later case of *Chicago B. & Q. R. Co. vs. City of Chicago*, 166 U. S. 226, 17 Supreme Court 580-587.

In *Minneapolis and St. Louis Railroad Company vs. Bombolis*, 241 U. S. 211, 36 Supreme Court 595, the Opinion of the Supreme Court delivered by Mr. Chief Justice White reads at p. 596:

> "Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to

what was necessary to constitute a verdict? Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 434, 12 L. ed. 213, 223; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U. S. 78, 93, 53, L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the author-

ity of state and Federal courts and their mode of procedure from the beginning."

Finally, in the very recent case of *Brady vs. Southern Railway Company*, 320 U. S. 476; 64 Supreme Court 232, the matter seems to have been put at rest. This was an action to recover for the wrongful death of plaintiff's intestate and was under the Federal Employers' Liability Act. The plaintiff recovered a judgment in the trial court of the State of North Carolina; the Supreme Court of that State reversed the judgment for the plaintiff, which action of the State Court was affirmed by the United States Supreme Court. We quote the following from the Opinion by Mr. Justice Reed at p. 234:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, *or by judgment notwithstanding the verdict*. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077," and other cases.

While four of the learned Justices dissented from the majority opinion, it is interesting to note that their dissent is based upon the effect of the evidence as establishing negligence rather than upon any irregularity in the procedure in the State Court.

We respectfully submit, therefore, that the 7th Amendment to the Constitution did not prevent the entry of judgment n. o. v. by the State Court in the case at bar.

The second reason urged for the granting of the writ is

that the decision of the Supreme Court of Pennsylvania is in conflict with the decisions of the Supreme Court of the United States as expressed in *Bailey, Admx. vs. Central of Vermont*, 319 U. S. 350; *Pederson vs. D. L. & W. Ry. Co.*, 229 U. S. 146; *Tennant vs. Peoria and P. U. Ry. Company* 321 U. S. 29.

We will consider each of these cases in its order.

Bailey vs. Central Vermont Railway, 319 U. S. 350; 63 Sup. Court 1062:

This was an action under the Employers' Liability Act instituted in the State Court of Vermont to recover damages for the death of an employee of a railroad. The jury rendered a verdict for the plaintiff and on appeal the Supreme Court of Vermont reversed the decision, holding that a motion for a directed verdict should have been granted because no negligence was shown. The negligence alleged against the defendant was its failure to use reasonable care in furnishing Bailey with a safe place to work. The evidence presented in that case showed that Bailey met his death when he fell from a bridge about eighteen (18) feet above the ground. He was working on a cinder car on the bridge, his job being to open the hopper car so that cinders could be dumped through the ties in the bridge floor onto the railway below. The only available footing on the side of the car was about twelve (12) inches wide, of which eight (8) or nine (9) inches was taken up by a raised stringer; there was no guard rail. The hopper car could have been opened before it was moved onto the bridge. The court found that there was sufficient evidence to go to the jury on the question presented.

In the case at bar, there is neither allegation nor proof that the plaintiff did not have a safe place to work. He alleges three (3) grounds of negligence as follows:

Insufficiency of tools and appliances with which to do the work; inadequate and unskilled help, and the negligence of the fellow employees in releasing their hold on the pipe.

The first of these is the failure to provide adequate equipment to do the work. He made out his case, if at all, by his own testimony. He admitted that the equipment consisted of two nose trucks, a one-wheeled dolly, a crow bar and rollers, all of which equipment was in the freight house on June 26, 1939, the date of the accident. The nose truck is a two-wheeled truck about five feet long with a piece of steel extending up on top of it about 8 inches, balanced on two wheels; it has two handles extending ten (10) or twelve (12) inches on each side; which are on the opposite end from the two wheels. In connection with this equipment it is important to know that Mr. Blair himself choose the nose truck because he considered it the best type of truck to use for handling the pipe. He did not attempt to prove any defect in the equipment. He stated that the dolly or nose truck, was not hard to push, and that all the men had to do was to push and steady the pipe onto the truck. With this same truck, Mr. Blair and his two assistants unloaded one piece of pipe; after the accident he continued to work and did not think he was seriously injured, and the three men proceeded with the same truck to reload the third piece of pipe, the second piece having slid onto the Mill truck at the time of the injury to Mr. Blair.

The second item of negligence was insufficiency of help in the unloading of the pipe. Mr. Blair was the only man working in the freight house, where he had been employed as a trucker for more than four years. He did not attempt to prove that it was necessary for more than two men to assist him in moving these pipes, nor that they were unable to do the job. In fact, Mr. Robert J. Miller and Mr. Dom-

enick Fanno, the two assistants, who were called upon by Mr. Blair to help him, very successfully assisted in moving the first and the third piece of pipe. He did not produce any testimony to the effect that it was usual or customary to have more men on a job of this kind, nor in fact did he prove anything about these men except their ages. In the petition for certiorari, the petitioner refers to the one assistant as the "aging and infirm car inspector". Mr. Miller, the car inspector was sixty-three (63) years old at the time of the accident, and Mr. Fanno was fifty-seven (57) years of age. It has been said in a number of decisions that youth alone is not sufficient evidence of negligence: *Rickard vs. Stevens*, 133 Pa. 538; this should apply also to age.

In *Snodgrass vs. Carnegie Steel Company*, 173 Pa. 228, it is held that the plaintiff, in order to recover in an action for personal injuries where he claims his injury was caused by an incompetent fellow servant must show (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetence was known to the defendant when he was employed, by reason of the fellow servant having a reputation for incompetency, and that defendant had knowledge of the incompetence during the employment and before the accident. None of these elements appear in this case. Also, after this accident the plaintiff without protest to any one, or a request for any other help, loaded the third piece of pipe, which was of the exact size of the second, carried it on the same little truck across the warehouse floor, and unloaded it onto the Tube Mill truck. Nowhere in the Record do we read of any protest made to the men themselves, or to the station agent as to the equipment or the helpers, although he had been just injured as above indicated.

Argument

In the case of *Lloyd vs. Norfolk and W. R. Railroad Company*, 151 Va. 409, 145 S. E. 372, it was held that where a track laborer had loaded seven (7) rails with the same assistants, this fact showed that the work could be accomplished with safety by the force then employed.

The third ground of alleged negligence was stated by the plaintiff, "the two men leaving go of it" (the truck). The plaintiff testified that an uneven place in the floor started the pipe to slip and that then the men let go of the nose truck, and the pipe slipped onto the warehouse floor. There was no allegation in the Statement of Claim, as to the condition of the floor. In its Charge to the jury, the court did not present to them any question as to the negligence of the defendant relative to the condition of the floor. There was no evidence to show any defect in the floor, with which the defendant could be charged, and this item was not before the jury when it brought in its verdict. Therefore, if the pipe began to slide because of an unevenness in the floor, an innocent cause, there could be no more negligence in the helpers' letting go of the handles in this sudden emergency than in the plaintiff attempting to hold onto his handle and suffering injury as a consequence thereof. If the accident occurred as stated by the helpers when called as defendant's witnesses, it occurred when they were about to push the pipe onto the Mill truck. Mr. Fanno, one of the helpers, stated that they gave it a push and that the hand truck hit the Mill truck, flew back and struck the plaintiff in the side. The trial Judge and the court en banc, had decided that the testimony of this witness "we give him push", might be some evidence of negligence, but the Supreme Court concluded that the only logical way to get the pipe onto the truck was to give it a push. There was no other way to load it. In order to make out negligence in this item, the plaintiff would be forced to show that the push was unusual or unnecessarily vio-

lent. This testimony was brought out in defendant's case, and plaintiff did nothing to use it to his advantage. He did not even cross-examine Fanno as to how much of a push they gave it, whether it was an ordinary or extraordinary push; what part of the nose truck struck the Mill truck, or any other particulars. The reason for this is apparent, when we consider that the plaintiff had testified that the accident took place at the other end of the warehouse, and nowhere near the Mill truck. In his Charge to the Jury, on this phase of the case, the trial Judge said:

> "The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair."

If what happened was the natural and desired result, how could there be any negligence in bringing about that result.

The Bailey case says: "To deprive these workers of the benefit of a jury trial in *close* or *doubtful* cases, is to take away a good portion of the relief which Congress has afforded them".

We submit that the distinction between the Bailey case and our case is obvious and that not only is the case at bar not a close or doubtful case as to negligence, but it does not even present a scintilla of evidence much less come up to the requirements pronounced in the Brady case, 320 U. S., *supra*, to the effect that, "the weight of the evidence under the Employers' Liability Act must be more than a

scintilla before the case may be presently left to the discretion of the triers of fact, in this case, the jury".

In the case at bar, the plaintiff was given every opportunity of proving his case. He was represented by counsel who has had much experience in this type of case and knows the measure of proof necessary. If plaintiff did not produce evidence to sustain the allegations of negligence it must have been because such proof was not available, and, as a matter of fact, he has not to date intimated that he might have produced more evidence on the subject of the controversy. An examination of the Record will show that the plaintiff's counsel was not impeded or hampered in any manner by either the court or opposing counsel. In attempting to make out his case, plaintiff was his own witness, and the story he told as to the occurrence of the accident was exactly opposite to the story told by the defendant's witnesses. After verdict for the plaintiff the case was argued at length before the court en banc, and again after appeals by both parties it was argued before the Supreme Court of Pennsylvania and a decision handed down by that Court without dissent. We respectfully submit that the plaintiff has had his day in court and that there is nothing in this case to commend it to the Supreme Court of the United States.

We would respectfully call the Court's attention to the fact that Mr. Justice Roberts wrote a dissenting opinion in the Bailey case saying at p. 1064: "I am of opinion that this case is one of a type not intended by Congress to be brought to this Court for review." He then, in a very clear and convincing opinion, states his reasons for this view, and was joined in his opinion by Mr. Justice Frankfurter. Mr. Chief Justice Stone then added the following short but convincing opinion at p. 1066:

"I agree with Mr. Justice Roberts that the pres-

ent case is not an appropriate one for the exercise of our discretionary power to afford a second appellate review of the state court judgment by writ of certiorari. But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided."

Pederson vs. D. L. & W. Ry. Company, 229 U. S. 146, 33 Sup. Ct. 648:

The main burden of the Pederson case was to establish that the plaintiff was employed in interstate commerce at the time of his injury. This case is cited by the petitioner for the proposition that the Federal Court cannot enter a judgment for defendant n. o. v. after a verdict for the plaintiff. We respectfully call the court's attention to the fact as shown in the first part of this Brief, that it was a State Court and not a Federal Court which entered the judgment in our case, and the Constitutional prohibition does not apply to the State Court.

Tennant vs. Peoria and P. U. Ry. Company, 341 U. S. 29; 64 Sup. Ct. 409:

This was an action under the Employers' Liability Act for recovery of damages for the death of plaintiff's intestate. The action was instituted in the Federal Court for the Southern District of Illinois, and the plaintiff recovered a verdict of $26,250.00. On appeal the Circuit Court of Appeals reversed the judgment after finding that, while there was evidence of negligence by the respondent, there was no substantial evidence that this negligence was the proximate cause of Tennant's death. There was evidence that the Railroad Company had a written rule as well as the practice and custom of ringing the engine bell in the course of coupling operations. Tennant was a switchman in one of

the yards. The engineer saw Tennant on the west side of the engine while waiting for the signal to backup and saw him walk toward the rear end of the engine and he was never seen alive after that. His duty was to stay ahead of the engine. The Supreme Court of the United States called attention to the legal proposition that there was a presumption in favor of Tennant, that he was in the performance of his duty and therefore, that he was back of the engine. He was apparently struck and killed by the backing engine, there being no eye witnesses to the occurrence. The question before the Court was whether the bell should have been ringing under the circumstances of the case. As stated by the Court, there was ample, though conflicting evidence, that the rule as well as practice and custom required the ringing of the bell in just such a situation. The ringing of the bell may well have saved his life. It is quite obvious that the question of proximate cause in the Tennant case was for the jury. If there was a custom and rule requiring the ringing of the bell, the employee might well have relied upon it.

Obviously there is no similarity whatever between the facts in the Tennant case and those in the case at bar. If the petitioner cited it as authority for the proposition that the Supreme Court might take jurisdiction of a case under the Employers' Liability Act after an adverse decision by an Appellate Court, with this we have no quarrel, but we fail to see how it can be authority and persuasive toward moving the Court to grant the writ in this case. Although in the Tennant case, the question of negligence seems very clear as stated in the majority opinion, yet Mr. Chief Justice Stone and Mr. Justice Roberts were of opinion that the judgment should have been affirmed rather than reversed.

The petitioner states five (5) questions to be present-

ed, presumably if the certiorari be granted. These questions are as follows:

1. Alleged error of the Supreme Court of Pennsylvania in holding that there was no issue of fact for the jury relative to safe and sufficient tools and appliances.

We have heretofore shown that there was no evidence offered by the plaintiff to show any insufficiency or inadequacy in the tools and appliances which were furnished to him, and with which he chose to do the work.

2. Alleged error of the Supreme Court of Pennsylvania in holding that there was no issue of fact for the jury relative to sufficient and skillful fellow servants to perform the work.

This question has likewise been covered heretofore in this Brief, and we have shown that the plaintiff wholly failed to prove that the two men who assisted him were unskilled in the work, and that a larger force was necessary to perform the job safely, and also that the plaintiff admitted that he continued to work with the same two men after the accident and successfully loaded the third (3rd) piece of pipe with the same equipment and the same helpers.

3. Alleged error of the Supreme Court of Pennsylvania in holding that there was no issue of fact for the jury relative to the action of the two assistants when they "abandoned their hold on the load before exerting their utmost physical strength to avert the catastrophe."

We respectfully call the Court's attention to the fact that there is absolutely no evidence that these men did "abandon their hold on the load before exerting their utmost physical strength to avert the catastrophe".

Argument

According to the Record the accident happened very quickly, and there was as much warrant for the handle slipping out of the hands of the assistants as there was for the plaintiff hanging onto his handle, as a result of which he was injured. There was no evidence offered by the plaintiff to show that these men acted in any manner which would impute negligence to them or the Railroad. What occurred was an unfortunate accident for which the Railroad should not be held liable.

4. Alleged error in the Supreme Court of Pennsylvania in re-examining the facts after they had been submitted to the jury.

This question has been covered in this Brief when we discussed the effect of the 7th Amendment to the Constitution of the United States, and the decisions of the Supreme Court, holding that this Amendment does not apply to courts of a State but only to courts of the United States.

5. Whether the Amendment to the Federal Employers' Liability Act of August 11, 1939, applies to this case which occurred June 26, 1939 and suit instituted June 18, 1941.

This question is here presented by the petitioner for the first time. In his argument before the Supreme Court of Pennsylvania, Brief for Appellant at No. 53 March Term, 1944, the attorney for the plaintiff practically conceded that the Amendment of 1939 was not retroactive. We quote the following from his Brief, pp. 7-8:

"At the time of this accident, June 26, 1939, the defense of assumption of risk was still available as a defense, although within two months thereafter by Act of August 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, Congress Amended the law abolishing 'every vestige' of assumed risk. * * * Assuming the Amendment is not

retroactive, we conclude that assumed risk was open as a defense in the instant case with the burden of proof thereof upon Defendant to satisfy the jury, except in clear cases where fair minded men couldn't draw different inferences from the facts."

Doubtless he raises this question because the Supreme Court of Pennsylvania in its Opinion, 145a, stated that, "a risk of the employment was that the equilibrium of the pipe might be disturbed, but that was a risk which the workman assumed". The Court came to this conclusion after having decided that there was no evidence of negligence on the part of the railroad employees. The question of whether or not the Amendment abolishing the defense of assumption of risk was retroactive, was not before the court, and the observation just quoted is the only reference to anything of that character. We have not been able to find any decision of your Honorable Court ruling on this phase of the Amendment, but we respectfully call attention to the following decisions of other courts on the subject, and more particularly to the reasoning upon which their conclusions are based.

In *Painter v. Baltimore and Ohio R. Company*, 339 Pa. 271, 13 A. 2d 396, the Supreme Court of Pennsylvania decided that the amendment did not apply to the Painter Case, the accident having occurred prior to its enactment, stating in its Opinion as follows:

> "It is argued that the purpose of this amendment was to bring all cases of injuries to railroad employees within the provisions of the Federal Act, whether or not such employees were engaged in interstate commerce, and further that the amending act is retrospective, although not expressly so declared. To adopt this construction would violate the fundamental principle 'that a statute shall not be given retroactive effect

unless such construction is required by explicit language or by necessary implication.' See United States v. St. Louis, etc. Ry. Co., 270 U. S. 1, 3, 46 S. Ct. 182, 183, 70 L. Ed. 435."

In *Guerierro vs. Reading Co.*, 346 Pa. 187, 29 A. 2d 510, the Supreme Court of Pennsylvania decided that the amendment did not apply to that controversy because the accident had happened prior to its enactment, and further that it was a clear case of assumption of risk whether negligence had been shown or not, and that the trial court had acted properly in granting a non-suit and refusing to take it off. In that case, an experienced section laborer informed his foreman that more than the four men then available were needed to lift the motor truck on the rail, and the foreman told the men to raise the truck and did not promise him any additional assistants. Because he thought that it was too heavy to lift and nevertheless proceeded to do so, the court held that he had assumed the risk of overexertion. He labored under no compulsion or any emergency. There was no testimony that he relied upon the foreman's judgment rather than upon his own. Under those circumstances he could not recover when injured as a result of lifting or assisting to lift the motor truck.

In *Lilly vs. Grand Trunk W. R. Co.*, 312 Ill. app. 73, 37 N. E. 2d 888, the Supreme Court of Illinois refused to give a retroactive effect to the assumption of Risk clause in the Amendment of 1939 for the reason that as stated by Justice Friend at p. 893:

> "It seems clear to us that the existence of assumed risk as a defense to a suit at law is a vested right and not a remedy because it affects the liability of a railroad to an action upon which a money judgment may be predicated. The cases relied upon by plaintiff's counsel, as well as quotations from textbook writers,

deal almost exclusively with remedies and not with vested rights. The right to a particular remedy may be taken away from litigants by the legislature through amendments which are retrospective, but the cases are uniformly to the effect that the legislature may not destroy a vested right by enactment of a law which operates retroactively. There is nothing in the amendment to the Federal Employers' Liability Act which would justify the assumption that congress intended to make it operative prior to August 11, 1939, the day on which it became effective."

In the case of *Christenson vs. Union Pacific Railroad Company*, 137 Neb. 538-290 N. W. 246, it was held that in an action for personal injuries sustained prior to the amendment, assumption of risk is a complete defense. Certiorari was granted by your Honorable Court (312 U. S. 673, 61 S. C. 733), but later dismissed (312 U. S. 710, 61 S. C. 825.)

We respectfully ask your Honorable Court to dismiss the petition for certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 265

CLARENCE W. BLAIR,
Petitioner

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Respondent

On Writ of Certiorari to the Supreme Court of Pennsylvania.

RESPONDENT'S BRIEF

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Respondent

On Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF

COUNTER-STATEMENT OF THE CASE

This is an action instituted under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. Section 51) by Clarence W. Blair, a trucker employed by The Baltimore & Ohio Railroad Company in its warehouse or freight house in Ellwood City, Pennsylvania, to recover damages for personal injuries sustained by him in the course of his employment on June 26, 1939.

The case was tried on plaintiff's (petitioner here)

Statement of Claim, the negligence alleged being (1) alleged failure to furnish plaintiff with safe equipment to do the job; (2) alleged failure to supply the plaintiff with sufficient and competent help; (3) alleged failure of Messrs. Fanno and Miller, fellow employees, to use reasonable care in the handling of the pipe.

At the trial before the Honorable James L. O'Toole, Jr., J., the jury rendered a verdict in favor of the plaintiff in the amount of $12,000. The defendant (respondent here) filed a motion for new trial. The defendant, also, having presented a point for binding instruction in its favor, which had been refused by the Trial Judge, moved for judgment non obstante veredicto. After argument, the court en banc refused to enter judgment n. o. v., but granted a new trial because of error in the Charge. The Opinion of the Court was written by his Honor, Judge O'Toole, and the refusal of the motion for judgment n. o. v. is the Order from which appeal was taken by The Baltimore & Ohio Railroad Company, to the Supreme Court of Pennsylvania, and the plaintiff likewise filed an appeal from the granting of a new trial. The Supreme Court rendered judgment for the defendant (respondent here) 349 Pa. 436, 37 A. 2nd 736, whose decision your Honorable Court has consented to review.

The facts of the case are briefly as follows:

On June 26, 1939, petitioner, aged 42 years, was employed as a trucker in the freight house (also called the warehouse) of the respondent company in Ellwood City, Pennsylvania (12a). His duties consisted of the loading and unloading of inbound and outbound freight, and on said date he was the only employee in the said warehouse, where he had been working continuously as a trucker since

December 6, 1935 (30a-31a). For the purpose of this loading and unloading, the company had provided two nose trucks, a one-wheeled dolly, a six-wheeled dolly, a crowbar and rollers, all of which equipment was in the freight house on June 26 (32a-33a). The nose truck is a two-wheeled truck about five feet long (21a) with a piece of steel extending up on top of it about 8 inches, balanced on two wheels; it has two handles extending 10 or 12 inches on each side; which are on the opposite end from the two wheels (17a).

The petitioner testified that about 10:30 a. m. he had unloaded the other merchandise in a car which had been spotted at the platform next to the warehouse, and that at the bottom of the car there were three lengths of seamless steel tubing about 30 feet long, each being about 10 inches in diameter, the three weighing 3100 pounds, and consigned to the National Tube Company at Ellwood City from Lorain, Ohio (23a, 13a). There was a steel plate from the car to the station platform, and the floor of the car and the platform were almost level; when ready to unload the pipe, he went in and told the agent that the pipe was too heavy for him to handle and suggested that it be sent on to the Tube Mill; the agent told him to get Mr. Miller, the car inspector, and Domenick Fanno, section hand, to help unload them; petitioner told him he didn't think they could unload them; the agent then informed him that if he didn't do the work, he would get someone else who would (14a-15a). The agent did not speak harshly, he merely stated that if Mr. Blair didn't do it, he would get someone else to do the work (60a). Blair then got the two men and proceeded to unload the pipe. He stated that they got the first tube up on the nose truck, and one of the men was holding on one of the handles, and Mr. Fanno was

on the front end; they had to zig-zag it to get it cornerways out of the car to clear the door, as the pipe was too long to come straight out; they got the first one out and loaded it onto the Tube Mill truck which was on the opposite side of the warehouse (16a-18a); they then went back to get the second piece and loaded it onto the nose truck and started out with it after they had zig-zagged it to bring it out of the door of the car and as they went through the door, coming into the warehouse from the car, the uneven part of the floor caused the pipe to slip, or to start slipping on the nose truck and the two men, Miller and Fanno, both let go of it and jumped and Blair tried to hold it on the truck to keep it from kicking him, but it kicked off to the side and the foot of the truck struck him in the side (19a). He stated that at the door of the warehouse, on the floor there had been a thick board, six or eight inches wide, nailed there and then beveled, and that the floor of the warehouse was formerly level with the floor of the platform but it had sunk (20a); that the tube when it lit was completely inside the freight house station on the floor (43a), and that he had just started in the door of the warehouse or freight house when it started to slip straight ahead. Although he testified that the cause of the pipe's slipping was not adequate equipment and then the two men leaving go of the pipe (19a), he stated on cross examination that when he hung on to the truck, it made the pipe go sideways instead of coming clear back again, and that was when it hit him (44a). He also testified that the pipe was black and greasy (22a), and that if you got it out of balance it would slide either way on the truck, and further that the truck carried the weight—all the men had to do was to push and steady the pipe (38a-39a); and that the hand truck was not hard to push (59a).

Mr. Carl V. Main, the driver for the National Tube Company, came out of the office with his way-bills and helped the three men put the piece of pipe back on the nose truck, and they then loaded it onto the tube mill truck (41a). The three men then went back to the car and loaded the third piece, using the same equipment and the same method of procedure (47a). Mr. Blair didn't think he was injured to any extent, and he kept on working for the rest of the week although he consulted the company doctor who gave him some medicine and taped his side (23a). Of all the equipment at the warehouse, Mr. Blair chose the nose truck because he said he could not have handled the pipe as well on the dolly truck (20a). He did not choose to use another truck which was available because it had been a rebuilt truck, not as good and was higher (23a).

The respondent's witness, Mr. Robert Miller, testified that the accident occurred in the freight house by the truck —just as they were putting it on the truck (70a). He stated that when it started to slip the front wheels of the hand truck were about 10 feet from the Tube Mill truck; that the end of the pipe had started into the Tube Mill truck and that it slipped into the said Tube Mill truck (71a). This witness had helped Mr. Blair before to move heavy freight, including tubing, and they used a nose truck (72a). They usually moved tubing for the National Tube Company by hand truck and laid it across the truck the same as was done in this case (73a). The only cause for the tube slipping was that it was greasy and hard to hold on to, steel against steel (74a). He stated that the weight of the tube caused the handles to fly out of his hand (74a).

Respondent's witness, Domenick Fanno, testified that

they had no trouble unloading the first piece of pipe, and that after they had put it on the Tube Mill truck, they went back to get the second piece (75a-76a). He stated that when they got the other piece and were near the truck, then they gave a push, and when they gave a push the little truck went against the big truck and the pipe went against the truck and the truck kicked back and hit Mr. Blair (75a). Mr. Fanno was on the front all the time; Mr. Miller was holding a handle on one side and Mr. Blair was holding the handle on the other side (76a). They loaded the third piece of pipe by the same method (77a). Mr. Fanno had helped Mr. Blair many times to load heavy pieces of freight (77a). Respondent's witness, Mr. Carl V. Main, testified that he had seen Mr. Blair handle tubing with two-wheeled trucks before and that everybody does it that way (88a) and that although he had never seen him load pieces as long as this one, he had seen pieces that were larger in diameter (89a).

Respondent's witness, Paul B. Forsythe, then cashier and chief clerk, described the equipment and stated that it was in good condition on said date (90a-91a). He denied that he had any conversation with Mr. Blair relative to loading this pipe and stated that he had assisted Mr. Blair with heavy pieces on other occasions (91a). He testified that the proper method was to use the one-wheeled dolly for oiled pipes because it cannot slip as it would on a nose truck but that it can be usually balanced on either (92a), and that they had handled heavier tubing than this, some with one inch wall, 33 to 34 feet long and have used the equipment described (92a-93a). He further stated that Mr. Blair had been instructed to get help in the loading and unloading of heavy pieces of equipment (93a).

ARGUMENT

Respondent respectfully submits that the judgment of the Supreme Court of Pennsylvania entered in its favor is not erroneous, but is in accordance with the applicable decisions of the Supreme Court of the United States, and therefore should be sustained. The main burden of petitioner's complaint is that the Courts of Pennsylvania deprived him of his constitutional right to trial by jury. Obviously, all plaintiffs are not entitled to a trial by jury. In any action based upon negligence, whether it be a proceeding under the Federal Employers' Liability Act, or any Act of Assembly or the common law, the plaintiff or claimant in the Court below has the burden of establishing negligence. The mere happening of an accident is not sufficient, nor is negligence which is not the proximate cause of plaintiff's injury. The plaintiff must prove first, that there was a negligent act of the defendant, and secondly, that that act contributed to his injury. In the case now before the Court, the reason for the granting of judgment in favor of the defendant by the State Courts, both the Court of Common Pleas of Allegheny County, Pennsylvania, and the Supreme Court of Pennsylvania, was not that there was not sufficient evidence of negligence, but that there was no evidence of negligence. We make the following quotations from the Opinion of the Supreme Court of Pennsylvania, 349 Pa. 456, as reported in 37 A. 2nd 736; at p. 736 the Court says:

> "After a trial in which he got a verdict, a new trial was granted, as the learned trial judge explain-

ed, because he had submitted to the jury defendant's liability for "* * * failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees * * *"; he stated that after reflection he had concluded that there was no evidence to support a finding of inadequate equipment or insufficient help and therefore a new trial was necessary to correct the error."

Page 737:

"In addition to alleging the elements of inadequate equipment and insufficient help, as to which the court said there was no evidence, the plaintiff alleged that he was injured by the negligence of defendant's servants. We think there was no evidence of such negligence."

Page 738:

"We can see nothing in that evidence that would justify a finding that defendant's servants were negligent in handling the freight. As the witness said, when the pipe was balanced on the truck, 'All you had to do was push and steady it'; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workman assumed. Cf. Guerierro v. Reading Co., 346 Pa. 187, 29 A. 2d 510; Reusch v. Groetzinger, 192 Pa. 74; 43 A. 398; Cacchione v. Hagan & Co., 249 Pa. 32, 94 A. 440; Pennsylvania R. Co. v. Brubaker, 6 Cir., 1929, 31 F 2d 939."

Page 739:

"The mere happening of this unfortunate accident is not evidence of negligence. The obvious risk

of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves. We see no evidence to support a finding of negligence. Cf. Detroit, G. H. & M. Ry. v. Maldonado, 6 Cir., 1932, 59 F. 2d 911."

From the foregoing quotations, it is obvious that the Courts of Pennsylvania found that there was "no evidence of negligence". Therefore, if there were *no evidence* of negligence, there were no facts to be submitted to the jury upon which to base a finding of negligence. Respondent submits for the consideration of your Honorable Court its argument in support of the judgment in its favor, under the following headings:

I. *Judgment for Respondent (Defendant Below) Was Correct*

(a) Power of State Court to enter judgment non obstante veredicto.

(b) Failure of petitioner (plaintiff below) to prove negligence.

(c) Assumption of risks of employment.

(d) Cases cited by petitioner distinguished.

II. *Judgment on Verdict Not Maintainable Because of Erroneous Charge of the Trial Judge*

Argument

PART I.

JUDGMENT FOR RESPONDENT (DEFENDANT BELOW) WAS CORRECT

(a) *Power of State Court to Enter Judgment Non Obstante Veredicto*

Petitioner alleges that his constitutional right to trial by jury has been violated.

He bases this contention upon the 7th Amendment to the Constitution of the United States, which provides inter alia that, "in suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law". If the contention of the petitioner is correct, then no judgment notwithstanding the verdict could be entered in any action at common law. It is a well known fact that judgments of this nature have been entered by the courts both State and Federal in many actions instituted under the Federal Employers' Liability Act, which is a common law action.

In the early case of *The Justices, etc. vs. United States ex rel. Murray*, 76 U. S. 658, 9 Wall. 274-282, it is decided that:

> "* * * the 7th Amendment could not be invoked in a State Court to prohibit it from re-examining, on a writ of error facts that had been tried by a jury in the court below".

This case is cited in the later case of *Chicago B. & Q. R. Co. vs. City of Chicago*, 166 U. S. 226, 17 Supreme Court 580-587.

In *Minneapolis and St. Louis Railroad Company vs. Bombolis*, 241 U. S. 211, 36 Supreme Court 595, the Opinion of the Supreme Court delivered by Mr. Chief Justice White reads at p. 596:

> "Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to what was necessary to constitute a verdict? Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 434, 12 L. ed. 213, 223; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U. S. 78, 93, 53, L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v.

Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning."

Finally, in the very recent case of *Brady vs. Southern Railway Company*, 320 U. S. 476; 64 Supreme Court 232, the matter seems to have been put at rest. This was an action to recover for the wrongful death of plaintiff's intestate and was under the Federal Employers' Liability Act. The plaintiff recovered a judgment in the trial court of the State of North Carolina; the Supreme Court of that State reversed the judgment for the plaintiff, which action of the State Court was affirmed by the United States Supreme Court. We quote the following from the Opinion by Mr. Justice Reed at p. 234:

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable

practice without submission to the jury, *or by judgment notwithstanding the verdict*. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077," and other cases.

While four of the learned Justices dissented from the majority opinion, it is interesting to note that their dissent is based upon the effect of the evidence as establishing negligence rather than upon any irregularity in the procedure in the State Court.

We respectfully submit, therefore, that the 7th Amendment to the Constitution did not prevent the entry of judgment n. o. v. by the State Court in the case at bar.

(b) *Failure of petitioner (plaintiff below) to prove negligence*

Preliminarily, the Trial Judge ruled out of this case any question of negligence of the respondent company as to the condition of the floor which was alleged by the plaintiff to have caused the pipe to slip on the nose truck. This is apparent from a reading of the Charge of the Court which set out all possible elements of negligence which the plaintiff attempted to prove under the allegations of his Statement of Claim (117a-118a).

This ruling of the Court was correct, for the reason that there was no evidence to show any defect in the floor, or, if the testimony had shown such defect, that the Rail-

road had knowledge, actual or constructive, of the same; and also, that even if there had been such proof, the defendant would not be liable where the employee's knowledge of the situation and the dangers existing was equal to that chargeable against the Railroad: *Schilling vs. Delaware and Hudson R. Co.*, 114 Fed. 2d 69; *Toledo St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 48 S. C. 215-217.

In his Opinion, in support of the Order appealed from, at page 135a, Judge O'Toole specifically found that "while there was sufficient testimony to support the third particular (carelessness of its employees in handling the pipe) and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either."

We submit that the Court was in error in not finding that the third ground of negligence was also not substantiated by the testimony. In order to show how the petitioner attempted to prove his case, we will refer to the three grounds of negligence alleged as follows: (1) Alleged failure to furnish petitioner with safe equipment to do the job; (2) Alleged failure to supply the petitioner with sufficient and competent help; (3) Alleged failure of Messrs. Fanno and Miller to use reasonable care in the handling of the pipe, and particularly the allegation in Fanno's testimony that they "gave it a push".

Petitioner rested his case on negligence on his own uncorroborated testimony. He first stated that the uneven place in the floor caused the pipe to slip, and then, later testified that the cause of the pipe slipping was "not adequate equipment for the first thing, just nothing but the nose truck; then the two men leaving go of it" (19a), and

again at (44a), on cross examination, stated: "When I hung on to the truck made the pipe go sideways instead of coming clear back again", so that we have three distinct causes for the accident appearing in his own case. The burden of proof rested upon the petitioner, (plaintiff below) as stated in 35 *American Jurisprudence*, Section 493, pages 907-908:

> "The general rules of evidence respecting the burden of proof and the burden of proceeding are the same in actions for injuries to employees as in other judicial proceedings. Fundamentally, the plaintiff has cast upon him the obligation of establishing every element of the case necessary to a recovery. He has the burden of proving the existence of the relationship of employer and employee at the time of the injury complained of; the employer's negligent act or omission respecting the duty which it is alleged was breached, that is, failure of the employer to exercise ordinary care for the safety of the injured employee or his failure to comply with a statutory duty imposed upon him; the happening of the injury as alleged; the causal relation between the employer's fault and the injury, the fact that the alleged breach of duty was the proximate cause thereof; and the character and extent of the employee's sufferings and the damages by reason of the injury. The plaintiff, however, need only raise a reasonable presumption that the cause of the injury was the conduct of the defendant.
>
> "It is incumbent upon the plaintiff to negative any inference that the injury resulted from a danger for which the defendant was not responsible.

"Negligence on the part of the employer is an affirmative fact that must be established by the injured employee; he must show that by some act or omission, the employer has violated some duty which he owed to the employee and which caused the injury complained of. The negligence on the part of the employer cannot be presumed from the mere fact of an injury sustained by the employee in the discharge of the duties of his employment, although many courts recognize that the circumstances under which the injury occurred may give rise to an application of the doctrine res ipsa loquitur. Generally, however, negligence cannot be inferred from the happening of an accident to an employee or from the discovery in a machine or other instrumentality of a latent defect, for which under the existing circumstances no responsibility can be imputed to the employer. There is no liability for injury to a servant unless there has been some negligence for which the employer is liable."

Even under the Employers' Liability Act, the employer is not an insurer of his employee's safety. There must be negligence proven against it: *Chicago and N. W. Ry. Co. v. Payne*, 8 Fed. 2nd 332-334. In the foregoing quotation from American Jurisprudence we call attention to the following phrase, indicating one of the elements which the plaintiff (petitioner here) has the burden of proving, namely, "the causal relation between the employer's fault and the injury, the fact that the alleged breach of duty was the proximate cause thereof". If the cause of the pipe slipping was an unevenness in the floor, then the plaintiff cannot recover because the Court has found no negligence on the part of the respondent as to the condition of the floor. If it was caused

by inadequate equipment, then likewise there can be no recovery because as shown in the Counter-Statement of the Case in this Brief, this same equipment was used in loading and unloading material of all kinds, including tubing, by this same employee not only for a number of years prior to the accident, but on the very day of the accident subsequent thereto. It will be recalled that the three men had unloaded the first of three identical pieces of pipe or tubing and had placed it on the Tubing Mill truck without any difficulty whatever, and after the accident they unloaded the third piece in exactly the same manner. This testimony adduced by the plaintiff himself proves that the equipment was adequate. Some question was raised in the defendant's (respondent) case as to whether this plaintiff (petitioner) made a wise choice in selecting the nose truck instead of the dolly, but as he was in charge of the unloading job and was experienced, and as he himself decided to use the nose truck, the respondent could not be charged with his mistake. The petitioner testified to no facts which would form the basis of a finding that the equipment was inadequate. His mere statement that it was inadequate proves nothing. This is the same as a man showing that he suffered an accident and failing to indicate wherein the defendant was negligent. No one would suppose for a moment that in this latter case, the petitioner could recover, because he must show more than the mere happening of an accident. In the case of *Missouri Pac. R. Co. v. Aeby*, 275 U. S. 426, 48 Supreme Ct. 177, the Court states at page 179: "No employment is free from danger. Fault or negligence on the part of the petitioner (the railroad company) may not be inferred from the mere fact that respondent fell and was hurt." In *Rodell vs. Adams*, 231 Pa. 284, 80 A. 253, a nonsuit was affirmed in a case stated in the syllabus as follows:

"1. In an action by an employee against his employer to recover damages for personal injuries from the breaking of an emery wheel, where the only negligence alleged is that the arbor or spindle on which the wheel ran was too light, a nonsuit is properly entered if it appears from the plaintiff's own testimony that he had had twenty years experience in the use of emery wheels, that he had selected the wheel in question himself from the stock in the factory and had placed it on the machine, that he had told his employer that it was difficult to grind tools on the wheel, but that he had not spoken of its being dangerous, and that he did not believe that it was dangerous.

"2. In an action for negligence it is not enough that a cause of action be shown, it must be the cause alleged."

What has been said of inadequate equipment applies also to inadequate help. The only evidence to show that the help supplied to the petitioner was inadequate was that the men were in their middle or late sixties. There is absolutely nothing indicating that they were inexperienced in the handling of freight or that they were not physically able to do this job. The men themselves testified that they had helped him with loading and unloading freight before (72a, 77a, 93a). The petitioner furnishes us with the information that the pipe was greasy (22a) and that if you got it out of balance it would slide either way, and that the truck carried the weight of the pipe; that all the men had to do was to push and steady the pipe, and that the hand truck was not hard to push (39a, 59a). Petitioner proved nothing upon which a charge of negligence could be predicated for failure to furnish sufficient help excepting the ages of the two men,

neither of which he could state accurately, testifying at page 16a: "They are both pretty old men. I do not know just the age but around sixty-five, I guess, seventy years old, maybe, Mr. Miller might be somewhere around that. How old is Mr. Fanno? Well, I would say he is in his sixties."

In the case of *Rickert v. Stephens*, 133 Pa. 538, 19 A. 410 a nonsuit was granted in a case where youth rather than age was an item of alleged negligence. What applies to youth applies also to age. If the plaintiff is attempting to show incompetence of these two helpers, then we say that he has failed to meet the requirements of the case of *Snodgrass vs. Carnegie Steel Co.*, 173 Pa. 228, 33 A. 1104, set out in the syllabus as follows:

> "In an action by a servant against his master to recover damages for personal injuries where the plaintiff claims that the injury was caused by an incompetent fellow servant whom the master had negligently employed, the plaintiff in order that he may recover, must show by affirmative testimony (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetency was known to the defendant when he was employed by reason of the fellow servant having a reputation for incompetency, or that the defendant had knowledge of the incompetency during the employment and before the accident."

Also, it must be remembered that after this accident happened, this petitioner, without protest to anyone, using the same nose truck and with the help of the same two aged men, loaded the third piece of pipe which was of the

exact size of the second, carted it across the warehouse floor and unloaded it into the Tube Mill truck. Nowhere in the record do we read of any protest made to the men themselves or to the station agent as to either equipment or helpers, although he had just been injured as above indicated.

In the early case of *Frazier vs. Penna. R. R. Co.*, 38 Pa. 104, we find the following language of Chief Justice Lowrie which applies to this case:

> "But if the plaintiff knew that his conductor was habitually careless, and chose to continue in service with him, and did not inform the company of his known acts of carelessness and refuse to serve with him, he can have no claim against the company for injuries suffered from further carelessness, even if the company did also know: 25 Alab. 659; 20 Barb. 449; 28 Id. 80; 4 Seld. 175; 5 Ohio St. R. 541; 2 Hurlst. & N. 258, 768; 9 Exchcq. 223; 27 Law T. R. 325; 28 Id. 139; Smith's Master and Servant 147, 150."

In the case of *Lloyd vs. Norfolk and W. R. Co.*, 145 S. E. 372; 151 Va. 409, it was held that where a track laborer had loaded seven rails with the same assistance this fact showed that the work could be accomplished with safety by the force then employed.

The third ground of alleged negligence is as stated by the petitioner "the two men leaving go of it". Mr. Blair had testified, it must be recalled, that what started the pipe to slip was the unevenness of the floor, or at another place, "not adequate equipment" (19a), neither of which forms a basis of recovery because no negligence has been proven. After the pipe started slipping, all three men had

one of two alternatives, either to hold on to the handle or pipe, or to let go. Mr. Fanno was at the front of the truck, and was, we presume, steadying the pipe with his hand. The petitioner did not attempt to describe his exact actions, contenting himself with the statement that Fanno was at the front of the truck, and we know that there was no handles on the front of the truck. The pipe was greasy and slippery, and when it started to slide Mr. Fanno could do nothing but get out of its way. Mr. Miller was on the left handle and Mr. Blair on the right. Each man, according to his own testimony, followed the first law of nature, which is self-preservation. Mr. Blair's testimony, on cross examination, at page 44a, was to the effect that his own action in hanging on to the truck made the pipe go sideways instead of coming clear back again. The learned Judge of the Court below gave great weight to the statement made by Mr. Fanno in defendant's case that "we give him a push" (76a).

True it is that on a motion for judgment n. o. v., the petitioner is entitled to the benefit of all the evidence in his favor, and all the inferences to be drawn therefrom, but in order to benefit by this statement of Mr. Fanno, he must admit that his own testimony, as to the place where this accident happened and its cause, was false. If the proximate cause of the sliding of this pipe was the fact that Fanno, Miller and the plaintiff pushed the pipe which caused the little truck to go against the big truck and then the pipe skidded onto the bed of the automobile truck (75a), it is absolutely necessary to discard the testimony of the petitioner himself (1) that the pipe began to slip because of the unevenness of the floor; (2) that the men let go of the nose truck and that the pipe slipped onto the warehouse floor (19a, 43a).

Both versions of the occurrence cannot stand together, as they are as irreconcilable as black and white. However, if we say, for the sake of argument, that a jury would be justified in giving to petitioner the benefit of this statement of Mr. Fanno, then let us consider whether or not giving the pipe or truck a push could be negligence under the facts of this case. Mr. Fanno testified, at page 75a: "We went and get that pipe on the truck. We put him on the truck and come back to get the other one. When we get the other one and we was near the truck we give a push and when we give a push the little truck went against the big truck and the pipe went on the truck and truck kicked back and hit Mr. Blair in here (indicating) * * *. We had no trouble with the first piece, no. Second piece, just we give him push and little truck went against the big truck and jumped back and hit Mr. Blair in here (indicating) * * *" (76a). "When we give shove the pipe, the car went and heavy weight of the pipe when hit against the Tube Mill truck, why, the car kicked, went way out and hit him here (indicating)" (76a-77a). And at page 79a, on cross examination in answer to the question, "You say that you skidded the pipe from the truck onto the bed of the automobile truck?" he answered, "Yes, sir, all three right on top of it." (79a) A reading of the testimony of Mr. Fanno in toto plainly indicates that he does not readily speak the English language, and also that he uses what might be called a very general method of description in that he showed a tendency to testify not only as to what occurred that day, but also as to the many times he and his gang of workmen would assist in moving heavy pieces of freight from the Tube Mill truck into the cars, giving answer not responsive to the questions of counsel.

The only method of propelling the nose truck was by pushing it along by the use of the two handles on the end

of it, which were manned by Mr. Miller and the petitioner. If they did not push the vehicle, it would remain stationary. Fanno himself, was in no position to do any pushing; he was at the front of the truck and was helping steady the pipe thereon. The pipe was greasy and slippery, and how he could push it is somewhat of a mystery. Therefore, when he said "we give it a push," he could have meant only Miller and Blair who were pushing the nose truck along the floor. This testimony was brought out in respondent's case, and petitioner did nothing to use it to his advantage. He did not even cross-examine Fanno as to how much of a push they gave it, whether it was an ordinary or extraordinary push, what part of the nose truck struck the Mill truck, or any other particulars, and this for a very good reason. Petitioner's version of the affair was that the accident did not happen at any place near the Mill truck; he was hoping to rely upon his alleged negligence in the construction of the floor or the fact that the furnishing of two men to assist him might be held inadequate. The push indicated by Fanno could take place at one point only, and that was if and when the little truck hit against the Mill truck. What happened when the push occurred? The pipe slid down onto the bed of the truck, which, as the Trial Judge states in his charge, was the natural result of their act. As showing the trial Court's understanding of the situation, we quote the following from his charge at page 115a:

> "The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of

the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair."

If they, including petitioner, desired the pipe to slide down onto the truck, and it did that, there certainly could be no negligence in giving it a push to bring about what the Court says was the natural and desired result. In order for this push or shove to be an act of negligence, it was the burden of the petitioner to prove that it was an unusual, extraordinary, and unnecessary push or shove, and as indicated above, he failed to offer such proof even by the cross examination of respondent's, witness Fanno.

Again, petitioner knew that the pipe was greasy and that if he got it out of balance it would slide either way; also, that by some method, the pipe would have to be skidded onto the Tube Mill truck. He failed to show that pushing it even by shoving the little truck against the big truck was anything out of the ordinary. Therefore, he assumed the risk of getting hurt if anything should go wrong in the prosecution of the work such as the pipes starting to slip or the handles kicking back.

The law requires petitioner, plaintiff below to prove by a preponderance of the evidence that the negligent act of the fellow servants proximately caused the hand truck to kick back and inflict the damage. The truck kicked back, under the petitioner's own testimony, because of the added weight, on the nose, and the truck kicked back in his direction and hit him on the side because he held on to the hand truck. Therefore, his holding on to the handle of the hand truck was the proximate cause of his injury and not any act of negligence on the part of the fellow employees: *Detroit, G. H. & M. Ry. Co. v. Maldonado*, 59 Fed. 2d 911.

Argument

(c) *Assumption of risks of employment*

This accident happened on June 26, 1939, prior to the amendment of the Federal Employers' Liability Act (which was adopted August 11, 1939) and therefore, the defense of assumption of risk even of ordinary negligence is a complete bar. All of the acts set forth heretofore in this Argument were risks which it was absolutely necessary should be assumed by the petitioner. He knew that the piece of tubing was to be placed upon the Mill truck; he had assisted in unloading many of these pieces theretofore; the method employed in getting the pipe on to the bed of the truck was apparently the only one that could be used. He assumed the risk of the pipe slipping off the dolly, and perhaps crushing his foot; of the car kicking back as it did and striking some part of his body and injuring him, or of strain caused by overexertion and many other features of the employment.

In the case of *Dutrey, Admr'x. vs. Phila. & Reading Rwy. Co.*, 265 Pa. 215, 108 A. 620, the law is stated by Mr. Justice Kephart at page 219 as follows, based upon United States Supreme Court decisions:

> "The employee assumes, as a risk of his employment, such dangers as are normally and necessarily incident to his occupation, and a workman of mature years, is taken to assume them whether he is aware of their existence or not; but risks of another sort, but naturally incident to the occupation, may arise out of the failure of the employer to exercise due care. They are the unusual, extraordinary and unexpected acts, and the employee is not to be treated as assuming such

risks until he becomes aware of their existence, unless the act or risk is so obvious that an ordinarily prudent person would have observed and appreciated them: Seaboard Air Line v. Horton, supra; Jacobs v. Southern Ry., supra; Boldt v. P. R. R., supra; C. & O. Ry. Co. v. DeAtley, 241 U. S. 310, 315; Erie R. Co. v. Purucker, 244 U. S. 320; C. & O. Ry. Co. v. Proffitt, 241 U. S. 462, 468."

It is submitted that the petitioner here assumed the risk of moving the tubing with the assistance of two men and the hand truck, where the petitioner, an experienced trucker and freight handler, was thoroughly familiar with the movement of heavy objects, and the question of proximate cause was one for the Court and not the Jury, and in this case the verdict should have been directed for respondent-defendant below: *Fitzgerald vs. Pa. R. R. Co.*, 121 Pa. Superior Ct. 461, 184 A. 299.

There is no testimony here that either Fanno or Miller voluntarily released their hold upon the tubing or exerted less than their utmost physical strength to support it, or handled it in any unusual manner, or were otherwise guilty of any fault. It is apparent from the petitioner's testimony, and from the weight of the tubing, that the force of the impact of the tube upon the nose of the truck was greater than that anticipated by plaintiff, Miller and Fanno. The result of the truck kicking back can be characterized as nothing more than a normal incident to the work in hand and as a risk assumed: *Pa. R. R. Co. vs. Brubaker*, 31 Fed. 2d 839.

Therefore, the fact of the truck's kicking back was a risk to be anticipated and one against which all three men attempted to protect themselves, each in his own way:

Fanno by stepping away from the slipping pipe, Miller letting go of the handle when the pipe slipping out of the truck forced it out of his hand by its weight, and the plaintiff, Blair, by hanging onto the handle.

In the late case of *Guerierro vs. Reading Co.*, 346 Pa. 187, 29 A. 2d 510, the plaintiff was injured on November 16, 1938. His action to recover damages was instituted under the provisions of the Federal Employers' Liability Act. The first trial resulted in a verdict for the plaintiff in the sum of $3100; a new trial was granted, and at the conclusion of the plaintiff's case at the second trial, a nonsuit was entered. The appeal to the Supreme Court was from the refusal of the Court below to take off the nonsuit. Because of the applicability of this decision to the several features of our case, we make the following quotations from the able opinion written by Mr. Justice Drew:

> "The accident happened on the morning of November 16, 1938, as plaintiff, a section hand of fifteen years' experience with defendant company, and three other laborers, in the performance of their regular duties, were rolling a motor truck, laden with various tools and equipment, from a tool house, over a turntable, onto an adjacent side track, preparatory to proceeding thereon to their destination along the interstate tracks of defendant railroad upon which they were to work that particular day. In so doing, the two front wheels of the truck left the track. Before replacing them, however, the men awaited the return of their foreman and plaintiff informed him that the truck was too heavy and that more men were needed to raise it. The foreman, without promising any additional assistance, told them: 'You raise it.' Thereupon the four men lifted the

end of the truck to the rails without even attempting to remove the tools and equipment therefrom, and while doing so plaintiff suffered an injury to his back. Although he complained thereafter from time to time of pain, he nevertheless continued at his regular employment for eight to ten weeks following the accident without seeking medical care.

"Since there is no question involved here as to any violation of regulations of the Interstate Commerce Commission, or other Acts of Congress, there can be no recovery by plaintiff, under the provisions of the Federal Employers' Liability Act, in the absence of negligence on the part of defendant company: Casseday v. B. & O. R. R. Co., 343 Pa. 342; New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367. Moreover, the mere happening of an accident raises no presumption that it was caused by negligence: Huff v. Illinois Cent. R. Co., 362 Ill. 95, 199 N. E. 116. The negligence upon which plaintiff bases his right of recovery is illegal inadequacy of help provided by defendant company to raise the derailed truck and place it back upon the track. To sustain this claim, he offered only his own testimony. Plaintiff testified that on previous occasions when the truck was derailed that 'if one end of the truck would fall (off the track) of course, it wouldn't require eight men, but if the entire truck was off, it would.' In answer to the question: 'I say, if eight men could lift the whole truck, four men could lift half a truck, couldn't they, yes or no?' plaintiff replied: 'Yes, sir, but of course, to lighten the weight on each individual, if there were eight around we would use eight.' *The record is devoid of*

any testimony from which it could be possibly inferred that the lifting of the truck was being done in other than the usual and customary manner, and that four men, as were used at the time plaintiff sustained his injuries, were inadequate, and for that reason there was nothing upon which a jury could have predicated a finding of negligence. It is well established that an employee is conclusively presumed to have knowledge of the ordinary risks incident to the occupation in which he voluntarily engages Roberts, Federal Liabilities of Carriers (2d ed.), Vol. 2, sec. 831, pp. 1608-09. In the present controversy, it clearly appears that plaintiff assumed the risk arising from the act of placing the truck or hand car upon the track, which was part of his regular duties incident to his employment, and thus is precluded from recovery.

"Even if the evidence offered were sufficient to sustain a finding of negligence, we are still of the opinion that under the undisputed facts defendant company is not liable. It is equally well settled that an employee is regarded to have assumed the risk attributable to his employer's negligence of which he is aware: Ches. & Ohio Ry. v. Proffitt, 241 U. S. 462. The burden of proving assumption of risk is on the employer, unless, of course, the evidence undisputedly shows such assumption: Kanawha Railway v. Kerse, 239 U. S. 576. Plaintiff testified: 'I know it was too heavy even before beginning to lift it', and he must, therefore, be regarded to have assumed the risk of overexertion. In Harmon v. Seaboard Air Line Ry. Co., 110 S. C. 153, 96 S. E. 253, it was held that a section hand had assumed the risk of injury in lifting a

piece of timber, even though the crew engaged to do the work was inadequate. It was said in Gulf, C. & S. F. R. Co. v. Spivey (Tex. Civ. App.), 56 S. W. (2d) 655, certiorari denied 290 U. S. 676; 'The rule seems to be generally sustained that, "in the absence of any emergency, where a servant knows or ought to know that the master has furnished too few servants for the reasonably safe prosecution of the work, he assumes the risks incident to working with insufficient assistance." 39 C. J. 744; Missouri, O. & G. R. Co. v. Black (Tex. Civ. App.), 176 S. W. 755. The duty of the servant in such cases is to quit the service. And in cases where injuries result in the absence of any emergency, from overtaxing his strength and overstraining his muscles, the uniform rule seems to be that the servant, who is the best judge of his own strength, assumes the risk of the consequences (citing numerous cases).'

Plaintiff contends, however, that he is absolved from the defense of assumption of risk for the reason that he complained that the truck was too heavy and that more help was needed before attempting to lift it, and that the foreman told him to proceed with the work. With this argument we do not agree. No promise was made that assistance would be forthcoming. There is not one iota of testimony from which any inference could be drawn that plaintiff relied upon the foreman's judgment, rather than his own. He labored under no compulsion or in any emergency. In this connection, it was said in Huff v. Illinois Cent. R. Co., supra: 'He (plaintiff) testified that he asked his foreman for additional help to remove the drawbar and

that his request was flatly refused, and he was informed that if he could not do the work the foreman would get some one who could. No element of negligence was involved in this transaction. Nor is there any contention that the employer violated any rule of law or any duty which it owed the plaintiff in determining that the removal of the drawbar was a one-man job. The plaintiff was not acting under compulsion or in any emergency, nor was he influenced by any promise of additional help. Under these circumstances he is conclusively presumed to have assumed such risks as were ordinarily incidental to his work. * * *" See also Chestnut v. Chicago, B. & Q. R. Co., 284 Ill. App. 317, 1 N. E. (2d) 811.

This is a clear case of assumption of risk, whether negligence had been shown or not, and the learned court below properly refused to take off the nonsuit which it had entered. In this view of the case, the other assignments need not be considered."

(d) *Cases Cited by Petitioner Distinguished.*

The petitioner urged that the decision of the Supreme Court of Pennsylvania is in conflict with the applicable decisions of the Supreme Court of the United States.

We will consider these cases and attempt to distinguish them.

Bailey vs. Central Vermont Railway, 319 U. S. 350; 63 Sup. Court 1062:

Argument

This was an action under the Employers' Liability Act instituted in the State Court of Vermont to recover damages for the death of an employee of a railroad. The jury rendered a verdict for the plaintiff and on appeal the Supreme Court of Vermont reversed the decision, holding that a motion for a directed verdict should have been granted because no negligence was shown. The negligence alleged against the defendant was its failure to use reasonable care in furnishing Bailey with a safe place to work. The evidence presented in that case showed that Bailey met his death when he fell from a bridge about eighteen (18) feet above the ground. He was working on a cinder car on the bridge, his job being to open the hopper car so that cinders could be dumped through the ties in the bridge floor onto the railway below. The only available footing on the side of the car was about twelve (12) inches wide, of which eight (8) or nine (9) inches was taken up by a raised stringer; there was no guard rail. The hopper car could have been opened before it was moved onto the bridge. The court found that there was sufficient evidence to go to the jury on the question presented.

In the case at bar, there is neither allegation nor proof that the petitioner did not have a safe place to work. He alleges three (3) grounds of negligence as follows: Insufficiency of tools and appliances with which to do the work; inadequate and unskilled help, and the negligence of the fellow employees in releasing their hold on the pipe.

The first of these is the failure to provide adequate equipment to do the work. He made out his case, if at all, by his own testimony. He admitted that the equipment consisted of two nose trucks, a one-wheeled dolly, a crow bar and rollers, all of which equipment was in the freight house

on June 26, 1939, the date of the accident. The nose truck is a two-wheeled truck about five feet long with a piece of steel extending up on top of it about 8 inches, balanced on two wheels; it has two handles extending ten (10) or twelve (12) inches on each side; which are on the opposite end from the two wheels. In connection with this equipment it is important to know that Mr. Blair himself chose the nose truck because he considered it the best type of truck to use for handling the pipe. He did not attempt to prove any defect in the equipment. He stated that the dolly or nose truck, was not hard to push, and that all the men had to do was to push and steady the pipe onto the truck. With this same truck, Mr. Blair and his two assistants unloaded one piece of pipe; after the accident he continued to work and did not think he was seriously injured, and the three men proceeded with the same truck to reload the third piece of pipe, the second piece having slid onto the Mill truck at the time of the injury to Mr. Blair.

The second item of negligence was insufficiency of help in the unloading of the pipe. Mr. Blair was the only man working in the freight house, where he had been employed as a trucker for more than four years. He did not attempt to prove that it was necessary for more than two men to assist him in moving these pipes, nor that they were unable to do the job. In fact, Mr. Robert J. Miller and Mr. Domenick Fanno, the two assistants, who were called upon by Mr. Blair to help him, very successfully assisted in moving the first and the third piece of pipe. He did not produce any testimony to the effect that it was usual or customary to have more men on a job of this kind, nor in fact did he prove anything about these men except their ages. In the petition for certiorari, the petitioner refers to the one

assistant as the "aging and infirm car inspector". Mr. Miller, the car inspector was sixty-three (63) years old at the time of the accident, and Mr. Fanno was fifty-seven (57) years of age. It has been said in a number of decisions that youth alone is not sufficient evidence of negligence: *Rickert vs. Stephens*, 133 Pa. 538 (19 A. 410); this should apply also to age.

In *Snodgrass vs. Carnegie Steel Company*, 173 Pa. 228 (33 A. 1104), it is held that the plaintiff, in order to recover in an action for personal injuries where he claims his injury was caused by an incompetent fellow servant must show (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetence was known to the defendant when he was employed, by reason of the fellow servant having a reputation for incompetency, and that defendant had knowledge of the incompetence during the employment and before the accident. None of these elements appear in this case. Also, after this accident the plaintiff without protest to any one, or a request for any other help, loaded the third piece of pipe, which was of the exact size of the second, carried it on the same little truck across the warehouse floor, and unloaded it onto the Tube Mill truck. Nowhere in the Record do we read of any protest made to the men themselves, or to the station agent as to the equipment or the helpers, although he had been just injured as above indicated.

In the case of *Lloyd vs. Norfolk and W. R. Railroad Company*, 151 Va. 409, 145 S. E. 372, it was held that where a track laborer had loaded seven (7) rails with the same

assistants, this fact showed that the work could be accomplished with safety by the force then employed.

The third ground of alleged negligence was stated by the petitioner, "the two men leaving go of it" (the truck). The petitioner testified that an uneven place in the floor started the pipe to slip and that then the men let go of the nose truck, and the pipe slipped onto the warehouse floor. There was no allegation in the Statement of Claim, as to the condition of the floor. In its Charge to the jury, the court did not present to them any question as to the negligence of the defendant relative to the condition of the floor. There was no evidence to show any defect in the floor, with which the defendant (respondent here) could be charged, and this item was not before the jury when it brought in its verdict. Therefore, if the pipe began to slide because of an unevenness in the floor, an innocent cause, there could be no more negligence in the helpers' letting go of the handles in this sudden emergency than in the petitioner attempting to hold onto his handle and suffering injury as a consequence thereof. If the accident occurred as stated by the helpers when called as respondent's witnesses, it occurred when they were about to push the pipe onto the Mill truck. Mr. Fanno, one of the helpers, stated that they gave it a push and that the hand truck hit the Mill truck, flew back and struck the petitioner in the side. The trial Judge and the court en banc, had decided that the testimony of this witness "we give him push", might be some evidence of negligence, but the Supreme Court concluded that the only logical way to get the pipe onto the truck was to give it a push. There was no other way to load it. In order to make out negligence in this item, the petitioner would be forced to show

that the push was unusual or unnecessarily violent. This testimony was brought out in respondent's case, and petitioner did nothing to use it to his advantage. He did not even cross examine Fanno as to how much of a push they gave it, whether it was an ordinary or extraordinary push; what part of the nose truck struck the Mill truck, or any other particulars. The reason for this is apparent, when we consider that the petitioner had testified that the accident took place at the other end of the warehouse, and nowhere near the Mill truck. In his Charge to the Jury, on this phase of the case, the trial Judge said:

> "The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair."

If what happened was the natural and desired result, how could there be any negligence in bringing about that result.

The Bailey case says: "To deprive these workers of the benefit of a jury trial in *close* or *doubtful* cases, is to take away a good portion of the relief which Congress has afforded them".

We submit that the distinction between the Bailey case and our case is obvious and that not only is the case at bar not a close or doubtful case as to negligence, but it

does not even present a scintilla of evidence much less come up to the requirements pronounced in the Brady case, 320 U. S. 476, *supra*, to the effect that, "the weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be presently left to the discretion of the triers of fact, in this case, the jury".

In the case at bar, the petitioner was given every opportunity of proving his case. He was represented by counsel who has had much experience in this type of case and knows the measure of proof necessary. If petitioner did not produce evidence to sustain the allegations of negligence it must have been because such proof was not available, and, as a matter of fact, he has not to date intimated that he might have produced more evidence on the subject of the controversy. An examination of the Record will show that his counsel was not impeded or hampered in any manner by either the court or opposing counsel. In attempting to make out his case, plaintiff was his own witness, and the story he told as to the occurrence of the accident was exactly opposite to the story told by the respondent's witnesses. After verdict for the plaintiff the case was argued at length before the court en banc, and again after appeals by both parties it was argued before the Supreme Court of Pennsylvania and a decision handed down by that Court without dissent.

Pederson vs. D. L. & W. Ry. Company, 229 U. S. 146, 33 Sup. Ct. 648:

The main burden of the Pederson case was to establish that the plaintiff was employed in interstate commerce at the time of his injury. This case is cited by the petitioner for the proposition that the Federal Court cannot enter a

judgment for defendant n. o. v. after a verdict for the plaintiff. We respectfully call the court's attention to the fact as shown in the first part of this Brief, that it was a State Court and not a Federal Court which entered the judgment in our case, and the Constitutional prohibition does not apply to the State Court.

Tennant vs. Peoria and P. U. Ry. Company, 341 U. S. 29; 64 Sup. Ct. 409:

This was an action under the Employers' Liability Act for recovery of damages for the death of plaintiff's intestate. The action was instituted in the Federal Court for the Southern District of Illinois, and the plaintiff recovered a verdict of $26,250.00. On appeal the Circuit Court of Appeals reversed the judgment after finding that, while there was evidence of negligence by the respondent, there was no substantial evidence that this negligence was the proximate cause of Tennant's death. There was evidence that the Railroad Company had a written rule as well as a practice and custom of ringing the engine bell in the course of coupling operations. Tennant was a switchman in one of the yards. The engineer saw Tennant on the west side of the engine while waiting for the signal to backup and saw him walk toward the rear end of the engine and he was never seen alive after that. His duty was to stay ahead of the engine. The Supreme Court of the United States called attention to the legal proposition that there was a presumption in favor of Tennant, that he was in the performance of his duty and therefore, that he was back of the engine. He was apparently struck and killed by the backing engine, there being no eye witnesses to the occurrence. The question before the Court was whether the bell should have been ringing under the circumstances of the case. As

stated by the Court, there was ample, though conflicting evidence, that the rule as well as practice and custom required the ringing of the bell in just such a situation. The ringing of the bell may well have saved has life. It is quite obvious that the question of proximate cause in the Tennant case was for the jury. If there was a custom and rule requiring the ringing of the bell, the employee might well have relied upon it.

Obviously there is no similarity whatever between the facts in the Tennant case and those in the case at bar. If the petitioner cited it as authority for the proposition that the Supreme Court might take jurisdiction of a case under the Employers' Liability Act after an adverse decision by an Appellate Court, with this we have no quarrel, but we fail to see how it can be authority and persuasive toward moving the Court to reverse in this case. Although in the Tennant case, the question of negligence seems very clear as stated in the majority opinion, yet Mr. Chief Justice Stone and Mr. Justice Roberts were of opinion that the judgment should have been affirmed rather than reversed.

In his argument at p. , the petitioner states that, "It is difficult to conceive of judicial view of the facts here presented more in conflict with the principle of liberal construction of the Act in the light of its prime purpose, the protection of employees against injury, set forth by Mr. Justice Murphy in Lilly vs. Grand Trunk W. R. Co., U. S. 87, L. Ed. 323, than the view accorded these facts by the Supreme Court of Pennsylvania."

A careful reading of the Opinion of the Supreme Court in the case of *Lilly vs. Grand Trunk W. R. Co.*, 317 U. S. 481, 63 Supreme Court 347, shows that the cause of action arose under the Boiler Inspection Act, and not mere-

ly under the Federal Employers' Liability Act. To show the inapplicability of the Lilly case to the case at bar, we quote, without comment, the following from the Opinion of your Honorable Court at p. 351:

> "Negligence is not the basis for liability under the Act (Boiler Inspection Act). Instead it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb.'"
>
> "* * * Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act."
>
> "* * * The Act, (Boiler Inspection Act), like the Safety Appliance Act, 45 U. S. C. A. sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment."

Finally, in his Brief at p. , the petitioner quotes the Opinion in *Union Pacific Railroad Company vs. Hadley*, 246 U. S. 330, 38 Supreme Court 318, as authority for the proposition that it is error for the Court below to consider items of negligence singly but that all of the alleged acts of negligence should be considered as a whole.

We respectfully submit that the case above cited is not authority for the proposition that acts of negligence may not be considered separately. All that the Opinion in that case decides is that "The Court was justified in

leaving the general question to the jury, *if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately and if the defendant's conduct viewed as a whole warranted a finding of neglect.*" It is to be noted that it is left to the discretion of the Court as to whether the bundle should be taken apart and the sticks broken separately, in other words whether the evidence is such as to justify taking apart the various acts which are alleged as negligence, and also it is to be noted that it was the defendant and not the plaintiff who wished to have this separation of the evidence. Further, in the Hadley decision we have a case where the employees of a railroad company ran one train into another. How there could fail to be negligence in a situation like this it is hard to understand. The position taken by the Railroad in the Hadley case was that the acts of the deceased and not the negligence of the Railroad, were the proximate cause of his death, but when it is considered that under the Federal Employers' Liability Act contributory negligence is not a defense but merely operates to reduce the damages, we have almost a case of res ipsa loquitur as to the negligence of the Railroad Company.

PART II.

JUDGMENT ON VERDICT NOT MAINTAINABLE BECAUSE OF ERRONEOUS CHARGE OF THE TRIAL JUDGE

The Court of Common Pleas granted a new trial in this case for the reason that the trial judge had submitted to the jury three (3) alleged grounds of negligence on the part of

the defendant company (Respondent here), two (2) of which were not supported by the evidence. We quote the relevant portion of the Opinion at pages 135a-136a as follows:

> "Plaintiff contended that the defendant was answerable for negligence in three particulars, viz., failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees as described above. The trial judge asked the jury to pass on all three particulars. This was error.
>
> While there was sufficient testimony to support the third particular and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either. We can not now determine on which particular the jury found the defendant had been negligent, and a new trial will be granted."

On appeal to the Supreme Court, defendant submitted that not only was there no negligence proven relative to adequate equipment and sufficient help, but also the petitioner did not sustain the burden of proving negligence of a fellow-servant for which the respondent would be answerable, and, therefore, the Court granted judgment for defendant (respondent here). We submit that if the third item of negligence had been proven as set out by the court below, then considering the charge, the awarding of a new trial was inevitable as the verdict could not stand. To submit to the jury three (3) possible grounds of negligence, when the proof sustains only one, is reversible error, especially so when it is a matter on which the plaintiff has the

burden of proof. In *Standard Pennsylvania Practice*, Volume 9, Section 503, Page 428 we read:

> "On the other hand where the court made an incorrect and misleading statement as to a material matter in its charge, an appellant can not surmise that the verdict was not affected thereby": Raskus vs. Allegheny Valley Street Railway Company, 203 Pa. 34-40.

In *Kelly vs. Crawford*, 137 Pa. Superior Court 197, 8 A. 2d. 449, a new trial was granted in a case where the trial judge instructed the jury as indicated in the following quotation from the syllabus:

> "In such case, it was basically and fundamentally erroneous and prejudicial for the trial judge to charge that if the lights on the sweeper were out of order, plaintiff should have put flares on the highway, where all the testimony in the case showed that the sweeper was moving at the time of the accident and there was no testimony to show that it had stopped."

In *Saunders vs. Pittsburgh Rys. Co.*, 255 Pa. 348 (99 A. 1006), the Court held it to be clear error to submit to the jury for their determination the question of fact as to how long beyond the actual time of her death Mrs. Saunders would have probably lived if she had not been injured when "there is not a syllable of evidence which would justify the jury in reaching any definite conclusion upon that point."

In our case the trial judge charged that the jury might convict the defendant of negligence if it found that the defendant had failed to provide adequate equipment for the work, or had failed to provide sufficient help for the work,

neither of which items of negligence are sustained by any evidence.

We respectfully submit that any verdict for the petitioner in this case is against the weight of the evidence. The petitioner's story as to how this accident happened was completely discredited by respondent's witnesses. The petitioner testified in chief that the pipe started to slip as they went through the door into the warehouse from the car (19a), and that this slipping was caused by the uneven part of the floor at that point. On cross-examination on page 43a, he testified that the tube when it landed was completely inside of the freight house station on the floor.

Respondent's witnesses, including the driver of the Tube Mill truck who was entirely disinterested, all testified that the accident took place at the Tube Mill truck, and that the pipe slid on the truck and not onto the floor of the warehouse as petitioner alleged. The car inspector, Mr. R. J. Miller, testified as follows at 70a:

> "Q. Where did this occur?
> A. In the freight house by the truck.
> Q. Just as you were putting it on the truck?
> A. Yes.
> * * * * * * *
> Q. Did it go on into the truck?
> A. Went into the truck."

Domenick Fanno testified at page 72a that:

> "* * * and when we give a push the little truck went against the big truck and the pipe went on the truck * * *."

Mr. C. V. Main, the truck driver testified at page 84a:

"* * * why, *they was putting the one (tube) on the truck* and I came around behind this tube that was sticking back of the back handles of the truck and I think I laid my hand on it to help balance a little just before they got to the truck * * *."

If petitioner's story is correct, the jury would be compelled to disregard all the testimony of respondent's witnesses, including that of Fanno relative to the push or shove which seemed to cause so much conjecture in this case, for the simple reason that at the time the pipe started to slide they were nowhere near the Tube Mill truck and hence, it would be physically impossible for the little truck to hit the big truck as testified to by Mr. Fanno. The only items of negligence then would be the condition of the floor which was not submitted to the jury, and the kind of equipment, and the men assigned to help on the job. We have shown the failure of plaintiff to carry successfully the burden of proof as to these items. If the jury believe the testimony of respondent's witnesses, then they must disregard the petitioner's entire case, and base their finding of negligence upon the push which landed the pipe on the bed of the truck where it was supposed to land. Without further description of the alleged push, and the utter lack of testimony relative to what part of the nose truck struck the Mill truck, that this was in any manner unusual or extraordinary (for all we know, it might have been the correct way of loading the pipe from the nose truck into the Mill truck,—and the presumption is that it was, as negligence is never presumed but must be proven), any finding of negligence would be a mere guess or conjecture. On this point we call the Court's attention to the early case of *Phila. & Reading R. R. Co. vs. Hummell*, 44 Pa. 375, where the Court, speaking through Mr. Justice Strong, says at page 377:

> "What is ordinary care, and what is negligence, are inquiries, in most cases, to be answered by a jury; but negligence is not to be found without evidence. There is always a presumption against it, and therefore a plaintiff who asserts it, and avers that he has received an injury in consequence of it, must always adduce proof that the defendant did not exercise ordinary care. If no such proof be adduced, the presumption of innocence remains, and it is error to submit to the jury the question whether there was negligence."

In this case there was not even the scintilla of evidence spoken of in *Lonzer vs. Lehigh Valley R. R. Co.*, 196 Pa. 610, 46 A. 937, and *Holland vs. Kindregan*, 155 Pa. 156-160, 25 A. 1077, which hold that the Court may direct a verdict for the defendant even in case of conflict of testimony, if the evidence amounts only to a scintilla.

Respondent respectfully submits that the decision of the Supreme Court of Pennsylvania in this case is not in conflict with the decisions of your Honorable Court, and that its judgment therefore should be affirmed.

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Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1944.

Clarence W. Blair, Petitioner,
vs.
Baltimore & Ohio Railroad Company, a Corporation.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

[January 29, 1945.]

Mr. Justice Black delivered the opinion of the Court.

A jury in the Common Pleas court of Allegheny County, Pennsylvania, awarded the petitioner a verdict for $12,000 damages for personal injuries in his action against the respondent railroad under the Federal Employers' Liability Act, 45 U. S. C., § 51 *et seq.* That Act authorizes an employee to recover for such injuries if they result "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its . . . appliances . . . or other equipment." The complaint set out in great detail the events leading to the injury and alleged that the injury was the result of the defendant's negligence in failing under the circumstances narrated, to provide petitioner with reasonably suitable tools and appliances, a reasonably safe place in which to work, reasonably sufficient and competent help to do the work, and the negligence of the respondent's employees who assisted him in doing the work. Respondent moved for judgment notwithstanding the verdict on the ground that there was no evidence to prove any negligence on its part. This motion was denied. Although the trial judge thought the verdict was "just and reasonable", respondent's motion for new trial was granted, on the ground that while the testimony was sufficient to support a finding that the negligence of respondent's employees contributed to the injury, it was not sufficient to show that the injury resulted from defendant's failure to provide adequate equipment, or sufficient and competent help. Both parties appealed to the Pennsylvania Supreme Court, which reversed, holding that petitioner had assumed the risk of injury by remaining in the employment

and that there was no evidence to support negligence in any respect. 349 Pa. 346.

To deprive railroad "workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, 354. Because important rights under the Act were involved, we granted certiorari.

Despite conflicting evidence, there was sufficient evidence to justify the jury in finding that the injury was inflicted under these circumstances. Petitioner's duties were to load and unload inbound and outbound freight. In unloading a car standing at the platform adjacent to respondent's warehouse, petitioner came to three 10 inch seamless steel tubes, approximately 30 feet long and weighing slightly more than a thousand pounds each. The pipes were greased and slick. The petitioner went to his superior, informed him that the pipes were too heavy for him to move and suggested that it was not customary for the railroad to unload pipes of this kind at its warehouse, but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy material. This suggestion was rejected and petitioner was then told to get Mr. Miller, the car inspector, and Mr. Fanno, the section man, to help him unload.

Petitioner's insistence that the three could not unload the heavy pipes was overridden, and he was then told to go ahead and do the work or they "would get somebody else that would." Under these circumstances, petitioner undertook to unload the pipes and carry them through the warehouse to place in the consignee's truck which had backed up to the warehouse platform on the opposite side from the railroad car. The best equipment available for moving the pipes was a "nose truck" of the kind commonly used in railroad stations to move freight and luggage. It was about five feet long and two feet high, consisting of a flat metal frame, with an upright flange and two wheels at one end and wheelbarrow handles at the other. The problem was to balance three greased, 1000 pound, 30 foot steel tubes on this truck, move them across two platforms through the warehouse and place them in the consignee's truck. The men took the nose truck into the car, managed to get the first pipe lengthwise on it, worked it through the car door to the platform over a steel bridge connecting the car and the platform, and then carried it to the waiting truck. Petitioner held one handle of the nose truck with one hand and

the steel tube with the other. Miller occupied the same position as to the other handle and the pipe. Fanno held the pipe and the truck at its wheel end. They were all necessarily crouching, since the truck was only two feet high when moved in a level position, as it had to be, to keep the tube from slipping off. The first tube was successfully moved. While they were attempting to move the second tube in the same manner, it slipped. Fanno and Miller released their holds, but petitioner did not. The heavy tube in slipping caused the truck to kick back resulting in petitioner's injury.

In the petitioner's four year service this was the first occasion that such heavy pipe had been moved at the warehouse. Fanno, aged 60, and Miller, aged 68, had never before assisted petitioner in such a movement; their duties were entirely different. The evidence indicated that the immediate cause of the greasy pipe's slipping as it did was either (1), an uneven place on the warehouse floor due to its having sunken in; or (2) pushing the nose truck against the standing company truck with such force as to make the tube move with great suddenness. The fact that Fanno and Miller released their grips after it began to slip also contributed to the suddenness and force of the kickback of the nose truck which caused the petitioner's injury.

We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer "becomes 'more imperative' as the risk increases." *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350, 352, 353. See also *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific Railroad Co.* v. *Hadley*, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000 pound steel tube, 30 feet in length, on a 5 foot truck, the area over which that truck was compelled to be moved, the suitableness of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties—all of these raised questions appropriate for a jury to appraise in considering whether or not

the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury "in whole or in part." Consequently we think the jury, and not the court should finally determine these issues.

The court below, however, thought that the plaintiff should not recover because he had assumed the risk of this danger. It is to be noted that at the time this case was tried Congress had passed an act which completely abolished the defense of assumption of risk. 53 Stat. 1404. *Tiller* v. *Atlantic Coast Line*, *supra*. We need not consider whether this statute applies to this case, since we are of opinion that it cannot be held as a matter of law that the petitioner assumed the risks incident to moving the steel tubes.

It is true that the petitioner undertook to do the work after he had complained to the company that the pipe should not be moved in the manner it was. But he was commanded to go ahead by his superior. Under these circumstances it cannot be held as a matter of law that he voluntarily assumed all the risks of injury. The court below cited by way of comparison its holding in a former decision, *Guerierro* v. *Reading Co.*, 346 Pa. 187. There it had announced the rule that an employee has a duty to quit his job rather than to do something which he knows, or ought to know is dangerous. This Court does not apply the doctrine of assumption of risk so rigorously. In *Great Northern Railroad Co.* v. *Leonidas*, 305 U. S. 1, we affirmed the judgment of the Supreme Court of Montana, 105 Mont. 302. In its opinion the Montana court stated: "We are not prepared to say that the hazard of carrying the [railroad] tie was so open and obvious that the plaintiff, as a matter of law, must be held to have assumed the risk of injury by yielding obedience to the command of the foreman." So here, we do not think that this petitioner can be held to have assumed the risk by obeying the command of his employer's foreman to go on with his job. The judgment of the Supreme Court of Pennsylvania is reversed, and remanded to that court for proceedings not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and Mr. Justice ROBERTS are of the opinion that the judgment should be affirmed.